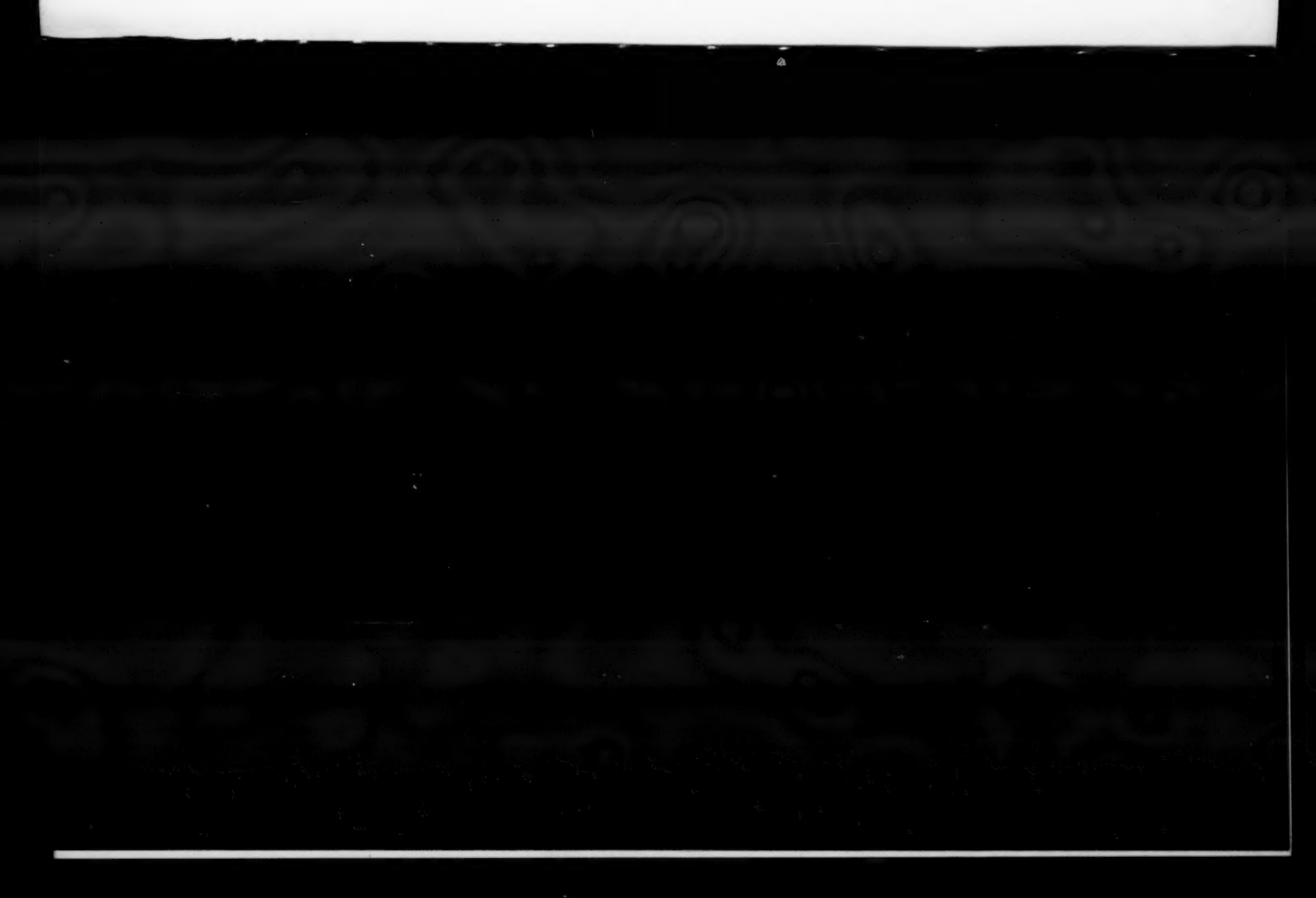

THE PRUSSIAN–AMERICAN TREATIES

I

FEW international agreements have received the praise accorded to the treaty entered into between the United States and Prussia in 1785. It was acclaimed at the time as setting a new standard of international conduct, realizing to the fullest extent the humanitarian aspirations of the eighteenth century. To Benjamin Franklin and Frederick the Great have been awarded the credit for this epoch-making document. Franklin's treaty, partly renewed in 1799, was again renewed in part in 1828. After the formation of the German Empire, the treaty of 1828 continued to be recognized as binding, and its provisions continued to serve for the adjustment of commercial relations between Germany and the United States without serious question until the outbreak of the present great European War.

After the Empire was established, the German Foreign Office undertook a systematic negotiation of commercial treaties with the various countries of the world. The old Prussian treaty, however, was considered, by both Germany and the United States, as sufficient for general purposes, and no general commercial treaty was negotiated between the two countries, international agreements between them being limited to the various conventions of narrower scope. The result was that the United States, confronted as a neutral in the world war with vast duties and responsibilities, found itself bound by an obligation, the principal part of which had been negotiated a century and a quarter before the war began. Never before had this treaty been subjected to any serious strain. The portions of the treaty first adopted in 1785 and then renewed in 1799 and in 1828 had received few interpretations. Between 1828 and 1914 the provisions of the treaty never became the subject of dispute between the United States and Prussia or the Empire.

While all works upon the history of American diplomacy have devoted considerable space to the negotiation of the original treaty

of 1785, no attempt, it is believed, has been made to fit the successive agreements into the general scheme of the foreign policy of the United States at the time of the various negotiations. It is proposed in the present article to re-examine the negotiations, to attempt to estimate the influences which produced the original treaty and the modifications of it made in 1799 and 1828, and to trace to their sources the unusual provisions of the treaty of 1785, so long praised as the realization of the ideal in international relations, but recognized since the present war began as provisions giving rise to very serious questions of construction and interpretation.

The authorship of the treaty of 1785 has usually been ascribed to Benjamin Franklin. The effect of the influence of Frederick the Great upon its provisions has been considered, and the general conclusion has been that Frederick adopted for the most part the propositions made by Franklin and his fellow commissioners without much modification, for the reason that the likelihood of either close relationship or serious disagreement between Prussia and the new-born republic of the new world was remote. In order to secure a market for Silesian linens and other products of Prussia, Frederick was willing to agree to practically anything which the American commissioners might suggest. The tradition that Frederick the Great was a friend to the cause of America was demolished some years since by Dr. Paul L. Haworth in an essay entitled "Frederick the Great and the American Revolution."[1] The most detailed account of the German side of the negotiations appeared in a monograph by Dr. Friedrich Kapp entitled *Friedrich der Grosse und die Vereinigten Staaten*, based to a considerable extent upon unpublished materials in the Prussian archives.[2]

Tracing the lineage of the Prussian treaty of 1828, we go back to that of 1799, from that to 1785. With the exception of the treaty of 1787 with Morocco, the treaty with Prussia was the last of the group of commercial treaties negotiated during the period of the Confederation. It followed the treaty of 1783 with Sweden, which was based upon that with the Netherlands of 1782, and this in turn drew in part upon the treaty of amity and commerce with France of February 6, 1778.

[1] American Historical Review, IX, 460–478. [2] Leipzig, 1871.

The French treaty is principally derived from the draft plan of the treaties submitted to the Continental Congress July 18, 1776. This draft plan is the starting point of American commercial treaties, and it has been noted that not only many of the provisions, but much of the phraseology of the draft plan of 1776, are reproduced in the treaties during the Confederation and also in those negotiated after the Constitution was adopted. On June 12, 1776, the Continental Congress selected a committee to prepare a plan of treaties to be proposed to foreign Powers. The committee consisted of John Dickinson, Benjamin Franklin, John Adams, Benjamin Harrison, and Robert Morris.[3] Of the drafting committee, only Franklin and Adams afterwards signed treaties for the United States. Franklin signed those with France, 1778, and Sweden, 1783. Adams was one of the signers of the treaty with the Netherlands in 1782, and both Adams and Franklin signed the Prussian treaty of 1785. The committee considered the form of the draft between June 12 and July 18, 1776,[4] when the plan was submitted in full to the Continental Congress. The extent to which the various members of the committee contributed to the formulation of the draft cannot be determined. Doubtless Franklin had much to do with it, but the original draft of the report is wholly in the writing of John Adams. The plan as finally amended was incorporated in the instructions of the Continental Congress dated September 24, 1776.[5] These instructions were prepared by James Wilson, who incorporated the amendments made to the plan by the Continental Congress. The question at once arises whence Adams and his associates derived the provisions of their plan of treaties. Adams's manuscript makes reference to the "collection of state tracts" and the "collection of sea laws," and these collections were doubtless made use of in preparing the draft. The exact editions, however, which were used have not been determined; but it is not difficult to indicate the sources from which the plan was derived. The treaties of Utrecht of 1713 commemorated the close of one commercial era and the opening of another. In particular, the treaties between France and England of March 31 and April 11,[6] and that between France and the United Provinces of the same date [7]

[3] Journals of the Continental Congress, Ford edition, V, 433.
[4] *Ibid.*, 576. [5] *Ibid.*, 813. [6] Dumont, Vol. 8, Part I, p. 345. [7] *Ibid.*, p. 377.

contained many of the provisions of Adams's draft. Several articles of the draft are of especial significance. Article 19 was as follows:

> It shall be lawfull for the Ships of War of either Party and Privateers, freely to carry whither so ever they please, the Ships and Goods, taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested, or seized, when they come to, and enter the Ports of either Party; nor shall the Searchers, or other Officers of those Places search the same, or make Examination concerning the Lawfullness of such Prizes, but they may hoist sail, at any Time and depart and carry their Prizes to the Place expressed in their Commissions, which the Commanders of such Ships of War shall be obliged to shew: on the Contrary, no Shelter, or Refuge shall be given in their Ports to such as shall have made Prize of the Subjects, People, or Property, of either of the Parties; but if such should come in, being forced by Stress of Weather, or the Danger of the Sea, all proper Means shall be vigorously used, that they go out, and retire from thence as soon as possible.

This sets forth in English the text of the twenty-sixth article of the Franco-British treaty of 1713. Article 27 of the draft includes a restricted list of contraband identical with that of Article 19 of the Franco-British treaty; and the list of merchandise never to be reckoned among contraband or prohibited goods which immediately follows in the draft is taken verbatim from Article 20 of the same treaty. Article 23 of the draft is as follows:

> For the better promoting of Commerce on both Sides, it is agreed, that if a War should break out between the Said two Nations, Six Months, after the Proclamation of War, shall be allowed to the Merchants, in the Cities and Towns where they live, for selling and transporting their Goods and Merchandizes; and if any Thing be taken from them, or any Injury be done them within that Term by either Party, or the People or Subjects of either, full Satisfaction shall be made for the Same.

This is derived without substantial change from Article 2 of the same treaty. Article 26 of the draft provides that free ships make free goods; while, on the other hand, that enemy ships make enemy goods was recognized by Article 16 of the draft. Both provisions were taken from the Franco-British treaty.

Enough has been said to warrant the conclusion that the doctrines of free ships, free goods; enemy ships, enemy goods; limited contra-

band list, and asylum for prizes appearing in the draft were derived from the corresponding provisions of the treaties of Utrecht; and these provisions, in addition to the more usual ones of the most favored nation clauses and the right to navigation and residence, the abolition of the *droit d'aubaine*, give us the main features of nearly all of the commercial treaties entered into between the United States and European countries during the period of the Confederation. The draft of July, 1776, was followed to a surprising degree in the French treaty of 1778. The provision with reference to asylum for prizes which appears in the French treaty was significantly placed, not in the treaty of alliance, but as Article 17 of the commercial treaty of 1778. The treaty with the Netherlands follows the French treaty or the draft as a common source with a few important exceptions. The provisions as to free ships, free goods, enemy ships, enemy goods, and asylum for prizes were repeated. The contraband article did not particularize as to the list of goods which could not be made contraband of war. The period of six months given to the nationals of the contracting parties for the purpose of quitting the country in case of war was increased from six to nine months, and in this respect followed the provisions of Article 41 of the Franco-Dutch treaty of Utrecht.[8]

The Swedish treaty of 1783 again follows very closely the provisions of the commercial treaties, even to the provision for asylum for prizes; and this treaty, negotiated by Franklin, was used as the basis of the negotiations with Prussia which were begun by John Adams.

II

THE NEGOTIATION OF THE TREATY OF 1785

The negotiation of a commercial treaty with the Netherlands, begun by John Adams, April 23, 1782, dragged along until October 8 of that year, when the treaty was signed. At Paris, meanwhile, overtures for a commercial treaty were made to Franklin by the Swedish ambassador. Writing to Livingston August 12, 1782, Franklin said, "I understand from the Swedish ambassador that their Treaty with us will go on as soon as ours with Holland is finished; our Treaty with

[8] Dumont, VIII, 1, 381.

France, with such improvements as that with Holland may suggest, being included as the basis." [9] Before the Netherlands treaty was signed, Franklin received his commission to negotiate a treaty with Sweden "having for its basis the most perfect equality, and for its object the mutual advantage of the parties." [10] The following April the treaty was signed by Franklin at Paris. The original instructions from the Continental Congress had not been materially changed since 1776, and the terms of Franklin's treaty departed little from those which Adams had agreed to at the Hague. "It differs very little from the plan sent me, in nothing materially." As this treaty was taken by Adams and Thulemeier, the Prussian minister at The Hague, as the basis for the Prussian treaty, the draft of Adams of 1776, the French commercial treaty of 1778, the Netherlands treaty of 1782, and that with Sweden of 1783 became linked together into one consistent body of principles.

To the extent to which these earlier treaties negotiated by the United States contained provisions which were carried into that with Prussia, we have but a continuation of a foreign commercial policy which antedates the Declaration of Independence. This policy, as expressed in Adams's draft of 1776 and in the French, Dutch, and Swedish treaties, was one based upon several considerations. It represented in the main the position of the continental European Powers, which had been opposed at times or continuously to the sea-power of Great Britain. Of these continental Powers France was the most conspicuous and powerful. Adams's draft incorporated the principles and practices of the opposition to British sea-power as they had been developed during the latter half of the seventeenth and all of the eighteenth century. These were advocated by most of the continental text-writers of the eighteenth century, who, influenced by the spirit of "enlightenment," strove for the recognition, not only of the so-called fundamental rights of states, but also of the newer rights of neutrals, all of them bulwarks of protection against brute force, whether exercised on land or sea. Of these, Vattel was the text-writer most in fashion, but it was Hübner, in his work on the capture of neutral vessels,

[9] Sparks, Dip. Corr. Rev., II, 389, quoted by Davis, Notes, 1398.
[10] Sept. 28, 1782, Dip. Corr. (Confed.), I, 34.

who gave fullest recognition to neutral claims.[11] Still later Galiani and Lampredi argued for neutral rights in doctrines which had found expression in the legislation of several Italian states some years before the famous neutrality proclamation of 1793.[12]

Adams's draft and the treaties based on it were, therefore, in harmony with continental theory and practice and opposed to the English prize-rules. In them all were the doctrines of (*a*) free ships, free goods; (*b*) its complement, enemy ships, enemy goods (especially valuable as against England); (*c*) the contraband list limited to war munitions and supplies; (*d*) the regulation of visitation and search by providing for approach; (*e*) the regulation of privateering by the requirement of bonds against unlawful seizures and unnecessary injury; (*f*) asylum for prizes; (*g*) nationals of one country to be considered as pirates who accepted letters of marque from the enemies of the other country. These were the leading provisions which protected the rights of neutrals. In time of peace nationals of the contracting parties were to be accorded either equality of treatment in their respective territories or treatment upon a most favored nation basis. In time of war a definite period was to be given for enemy aliens to arrange their affairs and depart freely. Summing up all these, we may say that the policy of the United States from the first was for freedom of intercourse in time of peace, as opposed to the older principles of mercantilism, for the rights of neutrals as against the claims of force, and for the preservation of personal and property rights on land, even in time of war. Until the Prussian treaty was signed, no commercial treaty entered into by the United States contained a single novelty. All of their provisions represented enlightened practice, most of them in harmony with the general maritime principles adopted by France, and in opposition to those of England. Adams's treaty with the Netherlands and Franklin's with Sweden continued in line with this general policy.

During the summer of 1783, following the signature of the Swedish treaty, Adams and Franklin received proposals for commercial trea-

[11] Hübner, *De la Saisie des Bâtimens Neutres*, 1759. The edition usually cited is that of London, 1778.

[12] De Martens, *Recueil*, III, 24–87. Tuscany, Aug. 1, 1778, followed by the Two Sicilies, Sept. 19, 1778, the Pope, March 4, 1779, and Genoa, July 1, 1779.

ties from Denmark, Portugal, Austria, Prussia, Tuscany, and Spain. Congress resolved that "the Minister of the United States be instructed to encourage overtures for treaties of amity and commerce from the respectable and commercial Powers of Europe, upon terms of the most perfect reciprocity, and subject to the revisal of Congress prior to their ratification." [13] Instructions in line with this resolution were adopted October 29, 1783. Special provisions were included for the negotiations with the Empire (Austria), Denmark, and Great Britain; but as to the other commercial Powers, no new instructions were formulated beyond the caution that the new treaties should not conflict with the previous obligations of the United States, that their terms should be for not more than fifteen years, and that they should be binding only when ratified by the Congress.[14]

The overtures to Franklin on the part of the Prussian minister at Paris did not directly propose a treaty. Writing to Livingston, July 22, 1782, Franklin said, "[He] has given me a Pacquet of lists of the several sorts of merchandise they can furnish us with, which he requests me to send to America for the information of our merchants." [15] No further steps were taken by Franklin, and the negotiation was opened at The Hague in February, 1784, between John Adams and Baron de Thulemeier, long resident at the Dutch capital as Frederick's diplomatic representative. Thulemeier informed Adams that "an arrangement might be made between his Crown and the United States which would be beneficial to both." Adams pleaded want of instructions and told Thulemeier that he could do nothing except in concurrence with Franklin and Jay, both then at Paris. Adams's colleagues concurred heartily in the plan of negotiating with Thulemeier, and suggested that in order to save time a draft treaty should be drawn and transmitted to Congress, which could then issue a commission to negotiate and sign, together with special instructions for the modification of the draft.[16]

Adams's negotiation with Thulemeier proceeded according to the plan agreed to by Franklin and Jay. Adams submitted to the Prussian representative a copy of the Swedish treaty, which was forwarded to

[13] Dip. Corr. (Confed.), I, 40.
[14] *Ibid.*, 42–44.
[15] Franklin, Works (Smith's ed.), IX, 67.
[16] Adams to President of Congress, March 9, 1789, Dip. Corr. (Confed.), I, 435–7.

Frederick. Schulenberg, Frederick's minister, was directed to draft from it a *projet* to be submitted to Adams. The Prussian *projet*, probably in the main the work of Schulenberg, was delivered to Adams early in April, 1784.[17] In general the terms of the *projet* were identical with those of the Swedish treaty. Special provision was made (Article 3) for the importation into the United States of Silesian linens and articles of Prussian manufacture, and for similar entry of American staples into Prussia upon a most favored nation basis. The contraband list was identical, save that saltpetre and cuirasses were omitted. Linens were specified as non-contraband, while gold was struck from the list of free goods. The reservation as to convoy appearing in Article 12 of the Swedish treaty was omitted. By Article 6 of the *projet* consuls were to be on the most favored nation basis, while the Swedish treaty provided for a special regulation on the subject. More significant was the omission of provisions based on Articles 22 and 23 of the Swedish treaty. The first of these provided for a term of nine months after the declaration of war between the parties in order that the merchants and other subjects of the contracting parties respectively might settle their affairs and withdraw from the other country. Similar provisions had been inserted in the treaties with the Netherlands and France (six months), derived, as has been indicated, from the draft of 1776. Article 23 had forbidden the nationals of Sweden and the United States respectively to accept letters of marque from each other's enemies under penalty of punishment as pirates. This provision had been copied from the earlier treaties of the United States and from the draft of 1776.

Adams's objections to the Prussian *projet* were not serious. He reported to Congress, June 7, 1784, that "the treaty is ready for signature, unless Congress have other alterations to propose."[18] His principal amendment was that the provision for asylum for prizes should protect the rights reserved to France: "No shelter nor refuge shall be given in their ports or harbors to such as shall have made prizes of the subjects of his Majesty, or of the said United States; and if they are forced to enter by distress of weather or the danger of the sea, they

[17] Thulemeier to Adams, N. D. Dip. Corr., I, 442.

[18] Adams to President of Congress, June 7, 1874. Dip. Corr. (Confed.), I, 458.

shall be obliged to leave as soon as possible." Adams suggested this addition: that "in case of war between Prussia and France, it would not be admissible for the United States of America to derogate from antecedent treaties concluded with the Most Christian King in favor of a more recent obligation contracted with his Prussian Majesty." [19] Thulemeier then proposed that the provision for asylum for prizes be omitted altogether, substituting therefor the following provision, which was in every respect in harmony with the modern doctrine of neutrality: "The armed vessels of one of the contracting parties shall not conduct prizes that shall have been taken from their enemies into the ports of the other unless they are forced to enter therein by stress of weather or danger of the sea. In this last case they shall not be stopped nor seized, but shall be obliged to go away again as soon as possible." [20] This change was made at the suggestion of Frederick. The right to bring prizes into American ports was of no value to him. There was small likelihood of any Prussian vessel of war ever taking prizes into an American port. On the other hand, there was danger of falling into the difficulties which the Netherlands and Denmark had encountered through the operations of John Paul Jones. American privateers were likely in case of war to operate in European waters and to need European ports as places of refuge. For Prussia to accept such a provision would be to assume a burden without receiving a corresponding benefit. Adams insisted that such a provision was a necessity to the United States.

At this point Adams's negotiation with Thulemeier closed. Congress, on May 12, 1784, issued a commission to Adams, Franklin, and Jefferson to negotiate a treaty with Prussia. Adams waited at The Hague until about the first of September, when Jefferson arrived at Paris. The three commissioners, writing to Thulemeier from Passy, September 9, 1784, informed him "that we are here ready to enter on the negotiation, and to reconsider and complete the plan of a treaty which has already been transmitted by your Excellency to your Court, whenever a full power from his Prussian Majesty shall appear for that

[19] *Ibid.*, 462. No such conflict was provided for in the Swedish treaty, nor in Article 5 of the additional convention with the Netherlands.

[20] *Ibid.*, 462–3. John Adams, Works, IX, 203.

purpose." [21] These commissions were accompanied by new instructions adopted by Congress May 7, 1784. Several provisions of these new instructions required a material recasting of the draft which had in most respects been agreed upon by Adams and Thulemeier. The first was an elaboration of Article 22 of the Swedish treaty, which followed the terms of Article 18 of the Netherlands treaty, Article 20 of the French, and 23 of the draft of 1776, and had been omitted from the Prussian *projet*.[22] The article of the treaty had protected merchants and other enemy nationals for the space of nine months after the outbreak of war and provided them with passports for leaving the country. The Continental Congress now included special provision for

> all fishermen, all cultivators of the earth, and all artisans or manufacturers, unarmed, and inhabiting unfortified towns, villages, or places, who labor for the common subsistence and benefit of mankind, and peaceably following their respective employments, shall be allowed to continue the same, and shall not be molested by the armed force of the enemy, in whose power, by the events of war, they may happen to fall; but if any thing is necessary to be taken from them, for the use of such armed force, the same shall be paid for at a reasonable price; and all merchants and traders, exchanging the products of different places, and thereby rendering the necessaries, conveniences, and comforts of human life more easy to obtain, and more general, shall be allowed to pass free and unmolested; and neither of the contracting Powers shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading ships, or interrupt such commerce.[23]

The next provision of the new instructions related to contraband. The Swedish treaty, in Article 9, followed the earlier treaties and the draft of 1776, including the restricted list appearing in the Franco-

[21] Dip. Corr. (Confed.), I, 503. Similar commissions were issued by the Continental Congress to Adams, Franklin, and Jefferson to negotiate commercial treaties with Russia, Germany (Austria), Prussia, Denmark, Saxony, Hamburg, England, Spain, Portugal, Naples, Sardinia, the Pope, Venice, Genoa, Tuscany, the Porte, Morocco, Algiers, Tripoli, and Tunis; *ibid.*, 80, 501. The Prussian treaty was the only one negotiated under these commissions.

[22] The same principle appears in Article 2 of the commercial treaty between Great Britain and France, 1713. *Cf.* also Article 14 of the treaty of peace between the same Powers, 1713; Article 17, Great Britain and Portugal, 1642; Article 36, Great Britain and Spain, 1667; Article 12, Great Britain and Russia, 1766. See Camillus (Alexander Hamilton), Defense of the [Jay] Treaty, Letter 22.

[23] Dip. Corr. (Confed.), I, 81–82.

British treaty of 1713.[24] This proposition, numbered four in the resolutions of the Continental Congress, and that numbered five in the same resolution, were adopted verbatim from those made by the American peace commissioners at Paris, June 1, 1783, for insertion into the definitive treaty of peace with Great Britain.[25] The proposition numbered five in the instructions was that contraband, described as "arms, ammunition, and military stores of all kinds," should not be confiscated, but might be requisitioned. Both propositions were unquestionably originally the work of Franklin, and contained ideas which in part had been suggested by him during the negotiations of the preliminary articles of peace. Writing Oswald, January 14, 1783, Franklin said,

> I enclose two papers that were read at different times by me to the Commissioners; they may serve to show, if you should have occasion, what was urged on the part of America on certain points: it may help to refresh your memory. I send you also another paper, which I once read to you separately. It contains a proposition for improving the Law of Nations by prohibiting the plundering of unarmed and usefully employed people. I rather wish than expect that it will be adopted. . . . It has not yet been considered by my colleagues, but if you should think or find that it might be acceptable on your side, I would try to get it inserted in the general treaty. I think it will do honour to the nations that establish it.[26]

The proposition referred to is in the form of a draft article for a treaty. It is identical with the fourth item of the new instructions of May 27, 1784.

Oswald was not returned for the negotiation of the definitive treaty, and David Hartley, an old friend of Franklin and "a strong lover of peace," took his place. Adams and Jay agreed to the articles which Franklin had outlined to Oswald, and Hartley sent them to London for the approval of the British Ministry. A copy was delivered to Vergennes at the same time. He acknowledged its receipt with the statement that he would need time to examine the articles before giving his judgment as to their wisdom in so far as they related "to our

[24] This contraband list antedates the treaties of Utrecht and is found without material change in the treaty between England and Sweden of 1656, Article 2, and in several other treaties between that time and 1713, as well as later. See Atherley-Jones, Commerce in War, 15, *seq.*, for comparative lists.

[25] Wharton Dip. Corr. Rev., VI, 471. [26] Franklin, Works, IX, 3, 4.

reciprocal interests."[27] Franklin urged Hartley to procure for his nation "the glory of being, though the greatest naval power, the first who voluntarily relinquished the advantage that power seems to give you of plundering others, and thereby impeding the mutual communications among men of the gifts of God, and rendering miserable multitudes of merchants and their families, artisans, and cultivators of the earth, the most peaceable and innocent part of our human species."[28]

After the formal presentation of the articles to Hartley, the negotiations were continued until August, when the British Ministry decided to agree to no alterations of the provisional articles, and to base the definitive treaty upon them only. All commercial matters were to be left to be arranged by a separate treaty to be negotiated later. Thus rejected by Great Britain, Franklin's articles were adopted in the next year by the Continental Congress and returned as familiar provisions to Franklin and Adams, then about to negotiate with Prussia. The idea of "delivering out" articles classed as contraband was added by Congress to Franklin's proposition of 1783 in these words:

> But if the other contracting party will not consent to discontinue the confiscation of contraband goods, then that it be stipulated, that if the master of the vessel will deliver out the goods charged to be contraband, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, but shall be allowed to proceed on her voyage.

This provision is the same, *mutatis mutandis*, as that in Article 13 of the treaty with Sweden, Article 25 with the Netherlands, Article 25 with France, and Article 28 of the draft of 1776.[29]

Another important section of the new instructions adopted some

[27] Franklin to Vergennes, May 5, 1783; Vergennes to Franklin, May 5, 1783. *Ibid.*, 38–39.

[28] Franklin to Hartley, May 8, 1783. *Ibid.*, 40.

[29] Mr. Atherley-Jones (Commerce in War, 388) says "The first conventional application of this practice [of delivering out contraband] appeared in the treaty of commerce between Russia and Denmark of October 8/19, 1782." It had appeared, as indicated, in two treaties negotiated before that time by the United States, and was no invention by the authors of the draft treaty of 1776. The same provision will be found in the Franco-British commercial treaty of 1713, Article 26, which was renewed February 10, 1763, and again broken in 1778 by the outbreak of war. It was a popular provision in commercial treaties between 1780 and 1856.

of the principles of Armed Neutrality: one, that free ships make free goods, with the omission of enemy ships, enemy goods; the other, that blockades, to be lawful, must be maintained by a sufficient naval force so as to expose blockade runners to "imminent danger." [30] The first was an important departure from the earlier American policy which had adopted the stricter French practice of holding "enemy ships, enemy goods," which bore more severely upon neutrals than did the old rule of the *Consolato*, followed by England and early contended for by Franklin as the unwritten rule of international law. The doctrine that blockades should be effectively maintained was one of the important maxims of the Armed Neutrality.

A counter *projet* prepared by the American commissioners in accordance with their new instructions was sent to Thulemeier in December, 1784, who sent it to the king with an enthusiastic approval of the new provisions. Frederick, in turn, asked his ministers for their opinion of them. Objecting to certain minor provisions which appeared for the first time in the counter *projet*, they expressed disapproval of the article providing for neutral asylum for prizes. Generally, however, they took the position that as war aimed, not at the ruin of individuals, but at a lasting peace, privateering should be regulated or abolished, and that the ordinary commerce of neutrals should not be interrupted by war. Only such neutral goods, therefore, ought to be interfered with as could be used directly in war or were sought to be taken to a blockaded port. The new provisions went further than this, yet they felt that the king might well agree to them as in harmony with the spirit of the age and for his greater glory. Comparatively few changes were made in the counter *projet*, and Frederick finally agreed to include the article on asylum for prizes.[31]

By the last of May, 1785, the treaty was in definitive form. In June it was translated into French and sent to Frederick, who authorized its signature. By the time the treaty was ready to be signed the

[30] *Cf.* Danish declaration, July 8, 1780; De Martens, *Causes Célèbres*, 2d ed., III, 278. It is an interesting coincidence that this exposition of the principles of the Armed Neutrality in 1780, the denial of the right of a neutral to allow the exportation of munitions in 1870, and Germany's contentions as to the neutral duties of the United States from 1914 to 1917 were made by three Counts von Bernstorff.

[31] Kapp, *op. cit.*, *passim*.

American commissioners had separated. Franklin signed at Passy on the 9th of July, Jefferson at Paris on the 28th of July, and Adams at London on the 5th of August, and, finally, Thulemeier signed at The Hague on the 10th of September, 1785. The original of the treaty was in French and in English. When Franklin signed, the French text had not reached Paris, and he signed only the English text. Jefferson and Adams signed both originals, as did Thulemeier. The English original was then sent to the United States for ratification by the Continental Congress. This took place May 17, 1786, and ratifications were exchanged at The Hague late in the following October.

III

THE TREATY OF 1799

The duration of the treaty of 1785 covered a decade, the events of the last portion of which immediately involved the United States in the contests of the world brought on by the aggressive wars of the French Republic. As the contest continued, the United States was faced for the first time with the difficulties of preserving neutrality in a contest between sea-power, on the one hand, and a continental Power seeking to overthrow the existing sea-power, upon the other. The situation resulted in a remolding of the foreign policy of the United States by the Federalists. The Jay Treaty may be taken as a measure of their success or failure. The question of the renewal of the treaty must be regarded in the light of the Jay Treaty and the effect which its provisions had upon the continental European Powers.

Jay was instructed, it will be remembered, to seek the adoption by England of the principles of the Armed Neutrality and generally for the provisions of the Prussian treaty, even "if attainable by abolishing contraband altogether." [32] This squarely challenged those principles of maritime practice for which England had contended. Any departure, however slight (and the departure was very slight), from British practice which Jay managed to incorporate into the treaty of 1794 was to that extent a victory for the traditional American (and hence continental) policy, broken in upon, it is true, by the series of

[32] Instructions to Jay, Am. State Papers, F. R., I, 473.

treaties which from time to time England had negotiated down to that of 1786 with France.[33] The last short-lived treaty renewed the restricted contraband list of 1713, included the same list of free goods, provided for delivery out of contraband, as well as for free ships, free goods, enemy ships, enemy goods, and asylum for prizes.[34] The outbreak of the war between England and France abrogated this treaty and gave rise to a series of reprisals affecting neutral commerce which culminated in the final entry of the United States into war against Great Britain in 1812. With this treaty set aside, Great Britain fell back upon the strict rules of the so-called unwritten law of nations for which she had contended at the time of the Silesian loan controversy. What England had been willing to recognize with France in 1786 was not likely under the change of circumstances to be adopted by her in the negotiation with Jay in 1794. The acceptance by Washington and Congress of Jay's treaty represents their abandonment of the earlier American policy. This was thought to be necessary because of the peculiar character of the conflict between British sea-power and a continental land-power seeking to dominate the sea. "Free ships make free goods" was surrendered. The contraband list, while restricted, included naval stores. Instead of a definite free list, conditional contraband was provided for, the articles of which were not to be confiscated, but to be requisitioned and paid for. Foreign enemy privateers were not to be allowed to arm in either British or American ports or to sell their prizes therein. The provision for asylum for prizes followed in general the provisions of the Prussian treaty, but added:

> No shelter or refuge shall be given in their ports to such as shall have made a prize upon the subjects or citizens of either of the parties; but if forced by stress of weather or the dangers of the sea to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed to operate contrary to former and existing treaties with other sovereigns or states. But the two parties agree that while they continue in amity neither of them will in future make any treaty that shall be inconsistent with this or the preceding article [as to foreign privateers].

[33] *Cf.* Neutral Rights, by J. F. W. Schlegel, American ed., 1801, for an examination of these.

[34] De Martens, *Recueil*, IV, 155.

Most important perhaps of all was Article 17, which directly recognized the old rule of the *Consolato*.

Hartley, in 1783, had said that by nature England and the United States must be closely associated either as enemies or as friends. The Jay Treaty recognized this and chose the latter alternative. The effect was seen when the Prussian treaty was about to expire. Steps were taken by Adams to renew it. Passing by the objections raised as to the appointment of John Quincy Adams as minister to Prussia in 1796, objections partly personal and partly based upon opposition to the creation of such a mission, and partly, too, upon the change in the policy of the United States in shifting from the principles of the treaty of 1785 to those of 1794, the appointment was ratified by the Senate.[35]

Pickering sent instructions for the negotiation of the treaty to John Quincy Adams, who was then at The Hague, expecting to be sent to Portugal, to which he had previously been appointed as minister. Pickering instructed Adams to omit the provision of the earlier treaty (copied from Article 17 of the Swedish treaty) exempting the vessels of either party from embargo so as to render them liable to a general embargo, a provision which had caused embarrassment to the United States in 1794. The twenty-third article, which forbade the commissioning of privateers to prey upon the commerce of the other in case of war, was also to be omitted. "Considering," wrote Pickering, "the abuses too often committed by privateers and the spirit in which privateering is commenced and prosecuted, it has sometimes appeared desirable to abolish the practice altogether. But the policy of this principle, as it respects the United States, may well be doubted. We are weak at present in public vessels of war. . . . Our chief means, therefore, of annoying and distressing a maritime enemy must be our privateers." The principle that free ships make free goods was to be abandoned. This doctrine, as expressed in all the previous treaties of the United States, except the Jay Treaty, was "of little or no avail, because the principle is not universally admitted among the maritime

[35] John Quincy Adams, Memoirs, I, 195–7. Senate Executive Journal, I, 158–9. The Senate voted, eighteen to eleven, against the motion that "there is not, in the opinion of the Senate, any present occasion that a minister be sent to Prussia." See Wheaton's International Law, secs. 457–470, omitted in Phillipson's recent edition.

nations. It has not been regarded in respect to the United States when it would operate to their benefit; and may be insisted upon only when it will prove injurious to their interests." Later Pickering added, "The abandonment of that principle was suggested by the measures of the belligerent Powers during the present war, in which we have found that neither its obligations by the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it has been made the sport of events."[36] Further, Pickering proposed to omit the provision abolishing the right to confiscate contraband and to substitute therefor the stipulations of the Jay Treaty, including naval stores as contraband.

The instructions to Jay in 1794 followed the lines of the Prussian treaty of 1785; those to Adams in 1797 followed the provisions of the Jay Treaty; in the three years the United States as a neutral had completely reversed the commercial policy adopted in 1776 when a belligerent. The administration judged it impossible for the United States as a neutral in a great maritime war successfully to contend for the old policy. Some leeway was given Adams, depending upon an

[36] Pickering to John Quincy Adams, Am. State Papers, F. R., II, 250. Writings of John Quincy Adams, II, 188–191. We have here the adoption of the American position that the rule of the *Consolato* was the true rule of international law; that "free ships make free goods" was valid only when stipulated in treaties. The phrase "pretended modern law of nations" refers to the continental position based on the law of nature. The English doctrine was adopted by Marshall for the reason that "the United States, having at one time formed a component part of the British Empire, *their* prize law was our prize law. When we separated it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it." Bentzon *v.* Boyle, Scott's Cases, 600. Though in many respects influenced by the law of nature (as in Fletcher *v.* Peck) Marshall did not adopt the theory that "free ships make free goods" was based on the law of nature, as held by the continental writers. It is suggested that Marshall's doctrine was influenced by the Federalist position from 1794 to 1799. Sir William Scott, afterwards Lord Stowell, sent to Jay, Sept. 10, 1794, a memorandum on prize court procedure, in which was incorporated a portion of the famous report of the law officers of the Crown made in 1753 at the time of the Silesian loan case. This portion set forth the doctrine of the *Consolato* as against free ships, free goods. Am. S. Papers, F. R., I, 494; Montesquieu characterized the report as *réponse sans réplique*. Vattel called it *un excellent morceau du droit de gens*. Law and Custom of the Sea (Naval Records Society, ed. Marsden), II, 348 n.

early peace or the continuation of the war. "If the negotiations for peace should be broken up, and the war continue, and more especially if, as you have conjectured, the United States should be forced to become a party in it, then it would be extremely impolitic to confine the enterprises and exertions of our armed vessels within narrower limits than the law of nations prescribes."

Adams received these instructions by the last of October, 1797. While he was in no sense pro-French, neither was he converted to the pro-British position of Pickering. "It is to my mind very questionable whether it would be expedient to propose the alterations suggested in your letters, except that relative to embargo," he wrote Pickering. "The principle of making free ships protect enemy's property has always been cherished by the maritime Powers who have not had large navies, though stipulations to that effect have in all wars been more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has had more uncontrolled command of the sea, and because France has disclaimed most of the received and established ideas upon the laws of nations and considered herself as liberated from all the obligations towards other states which interfere with her present objects or interests of the moment." Nevertheless, as every abandonment of neutral rights would strengthen British power, he insisted that it was the policy of every naval state to maintain "liberal maxims in maritime affairs against the domineering policy of Great Britain." [37]

After Adams arrived at Berlin, Frederick II died. Many vexatious delays interfered with the opening of negotiations, and not until May 19, 1798, did Adams receive credentials to be presented to Frederick's successor. With them Pickering sent new instructions. They were drafted upon the theory that the United States would soon be in the war against France. "With this prospect before us, no considerations occur which should induce" the admission of free ships, free goods. The recent French decrees which stated that the character of a vessel should be determined by the origin of its cargo, irrespective of ownership, was, it had been claimed, directed exclusively against the American merchant marine.

[37] John Quincy Adams to Pickering, Oct. 31, 1797; Writings, II, 218.

In this case a reversal of that stipulation is positively to be refused. The Swedish and Prussian commerce will then be only on the footing of the commerce of Denmark, with whom we have no treaty; and if we must be involved in the war, it will be desirable that the commerce of those three Powers, in relation to the United States, should rest on one and the same principle. But if this iniquitous French law exists (and we have no reason to doubt it), will all the northern Powers submit to it? We hope not. We hope that the inordinate ambition of France, and avowed design to subjugate all Europe (of which she already calls herself "the great nation" and "the conqueror") will excite the resistance of all the Powers whom her arms have not reached and arouse anew those whom the course of events have induced to submit. At present Britain appears to be the only bulwark against the universal domination of France, by sea as well as by land.[38]

Prussia, however, had made a treaty of peace with France, and Haugwitz, with whom Adams negotiated, was of notoriously Francophile sympathies. Discussing the French decrees against neutral commerce, Haugwitz told Adams that three alternatives were presented: one, tamely to submit and take their law from France (which he hoped they would not do); two, to throw themselves into the arms of England; or, three, to unite neutral nations for the defense of their rights, as another Armed Neutrality against France and England. Adams agreed that the third was the plan which the United States favored, though it was certainly not in line with his instructions, which adopted the second. Upon the receipt of this report of Adams's interview with Haugwitz, Pickering answered by a letter, which is remarkable not only for the light which it throws upon the policy of the Adams administration in its attitude toward France and England, but even more so for its relation to the situation in which the United States was put from August, 1914, to April 6, 1917. Let "Germany" be substituted for "France" and "submarine warfare" for "French decrees" (which, however tyrannical, at least had regard for human life), and the letter of Pickering becomes an exposition of the position of the United States as a neutral in the great war. The impotence of the northern Powers today results from the same conditions as in 1798, except that they are now more immediately at Germany's mercy than they were in 1798 at the mercy of France.

[38] Pickering to John Quincy Adams, March 17, 1798, Am. State Papers, F. R., II, 251.

Your conversation with the Prussian minister, as detailed in your letter of the 19th of February, is very interesting. The third of the alternatives mentioned by him, to maintain the dignity of the rights of neutral commerce, would, as you assured him, be most agreeable to the United States in reference to France. Both the others we should certainly reject. But at present how is the small maritime force of the northern neutral powers of Europe, with or without the inconsiderable armed ships of the United States, to control the British marine? The arming of Sweden and Denmark for this purpose in 1794 we know was perfectly futile. And in the existing state of things it would be highly impolitic to embarrass Great Britain by any maritime combination. For however much reason the neutral nations have to complain of her measures, the little finger of France in maritime depredations is thicker than the loins of Britain, and the safety of the portion of the civilized world not yet subjugated by France greatly depends on the barrier opposed to her boundless ambition and rapacity by the navy of England. If this navy were crushed or subjected to the power of France she would instantly become the tyrant of the seas, as she is already of the European continent. At present her rapacity is confined by the inferiority of her naval force which therefore exerts itself chiefly in acts of piracy on neutral commerce. But were the British navy subdued, France would insultingly prescribe law to the whole maritime world. If British cruisers commit aggressions, there is a well-founded expectation of redress, at least, in the supreme courts; but those of France, from the lowest to the highest, are generally corrupt and prompt to establish violence in the forms of law, and where the judges felt compunction (a most rare occurrence) the terror of the government enforces the execution of its iniquitous decrees. I refer to their practice in France. In their consular courts in Spain, and their West Indian tribunals, it is, if possible, still worse. Yet from the decisions of the consuls in Spain, although a number of appeals have been made to the courts in France, I do not recollect a single instance that has proved successful. In the West Indies nobody thinks of entering an appeal.

If there were to be a combination of the neutral powers to protect their commerce, it is against France that their force should be directed. But this is scarcely to be hoped for in respect to any of the powers to whose territories her armies can march, until her monstrous tyranny becoming still more insupportable at home as well as abroad, all Europe shall rise to overturn the execrable government that wields her immense force.[39]

Meanwhile Adams continued his efforts toward a revival of the system of the Armed Neutrality, though doubting that the United

[39] Writings of John Quincy Adams, II, 259.

States would be permitted to remain a neutral. He urged the arming of merchant vessels to oppose the French decrees at the same time that his father, as President, was urging the same policy, and seemingly without any suspicion that the arming of such vessels would be a departure from strict neutrality, as, indeed, it was not.[40] Still unwilling to surrender the principle of free ships, free goods, concerning which he agreed with Hübner and Lampredi that it was sustained by the law of nature, he suggested that a compromise might be made which would have the merit of consistency and mutuality. France, he said, had uniformly professed her attachment to the principle, and only departed from it because of England's practice. "It appears to me, therefore, that the stipulations ought properly to be made contingent," and that the parties to a commercial treaty "should agree that in all cases, when one of the parties should be at war and the other neutral, the bottom should cover the property, *provided the enemy of the warring power* admitted the same principle and practiced upon it in their courts of admiralty; but if not, that the rigorous rule of the ordinary law of nations [*i.e.*, the rule of the *Consolato*] should be observed." [41] Pickering agreed to Adams's suggestion, provided the stipulation should apply to "all neutral nations, as well as the contracting party remaining neutral." [42]

In July, Adams formally presented his plans for a renewal and alteration of the treaty of 1785. These were strictly in line with Pickering's instructions: the substitution of the rule of the *Consolato*, the recognition of the doctrine of contraband, including naval stores and material for ship-building, the abolition of special embargoes, and excluding the article against privateering. The provision as to asylum for prizes, he insisted, required alteration as in conflict with the present engagements of the United States with France and England.[43]

[40] John Quincy Adams to Pickering, March 8, 1798. Message of John Adams, March 14, 1798. John Quincy Adams, Writings, II, 267. The French had threatened to consider every armed ship as enemy and the sailors thereof as pirates.

[41] Adams to Pickering, May 12, 1798; Writings, II, 287. Adams introduced this provision into the Florida treaty, Article 12.

[42] Pickering to Adams, Sept. 24, 1798. *Ibid.*, II, 287.

[43] John Quincy Adams to the Ministers of State, etc., July 11, 1798. Am. State Papers, F. R., II, 252.

The Prussian commissioners declined to abandon free ships, free goods as a principle universally held by the northern nations, but, realizing the impossibility of effecting a recognition of it, in the circumstances, proposed that they agree to work for the adoption, after the conclusion of the war, by the great maritime Powers of Europe, of an arrangement "as would serve to establish upon fixed and permanent rules the liberty and security of neutral navigation in future wars." While willing to adopt the doctrine of contraband, they insisted upon the list as inserted in the treaty between Russia and Prussia of 1781, the traditional "restricted lists," rather than the one contained in the Jay Treaty. Ship-timber was not to be included as contraband because it was one of Prussia's principal productions. As to the prohibition of privateering under Article 23 of the old treaty, this was dictated, they said, "doubtless by the purest motives of benevolence and humanity, and it is not to be expunged without regret; but as this pleasant theory can with difficulty be put into practice, it only remains to renounce it, especially as the policy of the United States may be effected by it." [44]

In transmitting the Prussian answer, Adams said that unless he could admit free ships, free goods, and exclude ship-timber from the list of contraband, he had "no sort of expectation that the treaty would be renewed." [45] He finally agreed to eliminate ship-timber from the contraband list, and to say nothing in the treaty relative to free ships, free goods, thus abandoning the conditional declaration which he had suggested to Pickering. Adams argued, though doubtless with little enthusiasm, that free ships, free goods was not the rule of international law. The contraband list required more precise determination. One statement is significant: "It would . . . be proper to omit the term 'provisions,' which appears synonymous with that of 'munitions of war' and which is susceptible of being interpreted in a broader sense than intended by the high contracting parties." [46]

This was agreed to by the Prussian negotiators. "It is to be pre-

[44] Finckenstein, Alvensleben, and Haugwitz to John Quincy Adams, Sept. 25, 1798. Am. State Papers, F. R., II, 254.

[45] Adams to Pickering, October, 1798, *Ibid.*, 253.

[46] Adams to the Prussian Ministers, Dec. 24, 1798, *ibid.*, 263.

sumed," they wrote, "that the United States of America, who in their first treaty with Prussia had so clearly manifested the generous intention to withdraw, as much as possible, navigation and commerce from the effects of war, will not on this occasion evince a disposition less liberal than theirs, and we, therefore, believe that we can appeal with confidence to their ministers."[47] With this adjuration, they submitted their *projet* of a treaty. Adams suggested a few changes, omitting the stipulation that ships of war should not approach within cannon-shot of neutral vessels. This, he said, was seldom or never observed, and was difficult, if not impossible, of execution. A new *projet* including all of Adams's suggested amendments was then drawn and the treaty was signed July 11, 1799, on the thirty-second birthday of the American negotiator.

The first eleven articles of the treaty of 1785 were renewed in their entirety. Article 12 (free ships, free goods) was not renewed. The new twelfth article followed the Prussian suggestion that the whole matter be left for general negotiation after the war. Article 13 contained a short list of contraband articles (ship-timber omitted) which, however, were not to be confiscated, but to be detained and paid for, or delivered out. Article 14 was new and provided revised specifications for sea-letters. Article 15 was the same as that in the treaty of 1785, with the prohibition of approach eliminated. Article 16 permitted general embargoes. Articles 18 to 27 were the same as in the earlier treaty, except that Article 23 omitted the prohibition of privateering. The three great doctrines of the older policy were thus abandoned or suspended: free ships, free goods; the abolition of contraband, and of privateering. The negotiation had lasted more than a year. Writing to Pickering in September, 1798, John Adams stated that he was not at all mortified at the delay of the treaties with Prussia or Sweden, having "no ardent desire of any treaties till the crisis in Europe is more decided." "Our commerce is of more consequence to them than theirs to us; and with or without treaties, we shall have all we want."[48]

The X, Y, Z affair and trouble generally with France made the renewal of the Prussian treaty a matter of little consequence, and not

[47] Prussian Ministers to Adams, Feb. 19, 1799, *ibid.*, 265.
[48] John Adams, Works, VIII, 595, 599.

desirable unless with material alteration. The treaty in duplicate, with French and English texts, was sent to the Senate by President Adams December 6, 1799, and referred to a select committee, of which Bingham was chairman. This committee advised ratification January 28, 1800, which was accomplished February 18 by a vote of twenty-six to six.[49] Ratifications were exchanged at Berlin June 22, 1800, and the treaty was finally proclaimed November 4, 1800. As its duration was for ten years after exchange of ratifications the treaty expired June 22, 1810, in the midst of the new series of international difficulties directly culminating in the War of 1812.

IV

THE TREATY OF 1828

John Quincy Adams was recalled from Berlin in 1801 at the President's suggestion. The legation was discontinued until 1835. Prussia sent a *chargé* to the United States in 1825. The renewal of the Prussian treaty in 1828 belongs to a new period of commercial treaty negotiations. The first treaty with Sweden had been for the most part renewed for eight years in 1816. The Prussian treaty had remained since 1810 without renewal. The new period begins with the recognition of the Latin-American Republics, with which commercial treaties were first made in the administration of John Quincy Adams. When Niederstetter, the new Prussian *chargé*, was presented in June, 1825, the President recalled that the relations between the United States and Prussia "had always been interesting and uninterruptedly friendly; that they had also been distinguished by the negotiations, at two different periods, of treaties in which the first examples had been exhibited to the world of national stipulations founded upon the most liberal principles of maritime and commercial law."[50] Recalling that Adams had favored the retention of the principal provisions of the treaty of 1785 and only reluctantly agreed to sign the treaty of 1799,

[49] Senate Executive Journal, I, 326–7, 337–40. Voting in the negative were Baldwin, Brown, Langdon, Mason, Nicholas, and Pinckney. *Cf.* Secretary Lansing to Von Bernstorff, March 2, 1916, special supplement to this JOURNAL, October, 1916, 392.

[50] John Quincy Adams's Memoirs, VII, 25.

as it departed from the lines of the earlier instrument, it is not surprising that the plan for a new treaty should have followed that of 1785 rather than that of 1799.

The world then was in the midst of the forty years' peace. British pretensions, against which the United States had ranged herself, had abated somewhat since the end of the Napoleonic Wars. The negotiation, of which the records are short, was comparatively simple. Clay proposed the revival of Articles 12 to 24, inclusive, of the treaty of 1798, and Article 12 of the treaty of 1785. To all of this Niederstetter consented. The provision in Article 23 of the treaty of 1785, prohibiting privateering, was also suggested by Clay. As to this Niederstetter had no instructions. The recently negotiated treaty with Sweden and Norway contained a provision relating to blockades, which provided that a vessel bound to a blockaded port should not be captured on its first attempt to enter the port, unless the vessel knew or ought to have known that the blockade was in force. This article Niederstetter proposed to have included, and the President acquiesced, although Clay desired a more precise definition of blockade, as to which the Prussian *chargé* had no instructions.

In general, the treaty, which was signed May 1, 1828, followed in Articles 1 to 11, inclusive, and Article 13, the recent treaty with Norway and Sweden. Article 12 renewed Article 12 of the treaty of 1785 and Articles 13 to 24, inclusive, of that of 1799, with the exception of the last paragraph of Article 19, which had reserved rights in favor of Great Britain under the Jay Treaty. More general reservations were now made which applied to all articles revived in favor of all the treaties of the United States made between 1810 and 1828. The vexed question of the status of private property at sea reappeared. While "free ships, free goods" was re-adopted, the provision against privateering was omitted, as was that abolishing contraband. The diversity of practice and opinion in 1799 continued in 1828. Therefore, Article 12 of the new treaty concluded with a renewed expression of the desire to see adopted "further provisions to ensure just protection and freedom to neutral navigation and commerce, advance the cause of civilization and humanity," and the engagement was made "to treat on this subject at some further and convenient period." Not until the Hague

and London Conferences was a "convenient period" presented. Unlike the earlier treaties with Prussia, the duration was for the term of twelve years, after which, if not previously denounced by one year's notice, the new treaty was to continue indefinitely.

V

THE TREATY FROM 1828 TO 1917

As the treaty of 1828 provided a method for termination by notice, there is no ground for reading into it what not only Treitschke, but Phillimore as well, said was to be understood in all treaties, the clause *rebus sic stantibus*.[51] The maxim that every treaty is to be understood *rebus sic stantibus*, Wharton held to apply to all cases in which the reason for a treaty has failed or there has been such a change in circumstances as to make its performance impracticable except at an unreasonable sacrifice.[52] When denouncement by notice may take place at any time, it is idle to take the position that a treaty is void through obsolescence. The purpose of a provision for unilateral denunciation is to furnish a way out of the inconvenience growing out of changed circumstances, an excellent example of which may be seen in the denunciation of the Russian treaty of 1832. If a treaty is actually impossible of performance, for whatever reason, whether because of the failure of status of one of the parties as a subject of international law, or because of the non-existence of the subject-matter, or because it is generally *functus officio*, the treaty drops of itself as a whole, the denunciation article included.

In but one provision of the treaty, that of Article 19 on neutral asylum for prizes, would it seem that a good argument might be made that the treaty is obsolete because in conflict with modern international law. Yet Kohler held that the whole of Article 13 of the treaty of 1799 (renewed in 1828), by which contraband was to be detained but not confiscated, was obsolete. "It contradicts the modern development of international law, as was expressly recognized by America at London," he says. Krauel, in discussing the *Frye* case, described the contraband

[51] Phillimore, International Law, II, 58–59.

[52] Wharton, International Law Digest, II, 58. Moore, Digest, V, 319.

article as a curiosity in international law, not binding upon Germany in the present war, and in opposition to the provisions of the German Prize Regulations of 1909. So also Fleischmann, defending the sinking of the *Lusitania*, argued that the treaty was no longer binding.[53]

A sufficient answer to all these claims is that no one, prior to the present war, took any such position, and that in no official discussion of the treaty, either by Germany or the United States, was such a claim made; nor were any steps taken by either of the parties to denounce it by notice. Prussia recognized the validity of the treaties in 1861, our Civil War giving to its peculiar provisions "a practical meaning."[54] In 1870 the Prussian Government expressly recognized the binding force of Article 13 of 1799 (renewed in 1828) to the effect that contraband was not to be confiscated. In the proclamation of neutrality at the outbreak of the Franco-Prussian War, the validity of the article providing for asylum for prizes was specifically recognized by the United States.[55] In 1900 the German Chancellor stated that German commercial relations with the United States rested upon treaty-rights contained in the Prussian-American convention of 1828 and in similar agreements with the other German maritime states.[56]

On the American side, the treaties are contained in the Statutes at Large, and in so far as not interfered with by later statutes, are a part of the law of the land. They were indirectly upheld in a recent decision of the United States Supreme Court (United States *v.* Pulaski, decided March 6, 1917). As international acts they have always appeared in the official compilations of the treaties in force.[57] Indeed, no intima-

[53] *Zeitschrift für Völkerrecht*, IX, 19, note; Krauel in same, 18–19; Fleischmann, in same, 172–3. *Cf.* B. Schmidt, *Über die Völkerrechtliche clausula rebus sic stantibus*, in Jellinek's *Staats- und Völkerrechtliche Abhandlungen*, Vol. VI, 25, whose statement, that international treaties are to be set aside because of changed circumstances only when the highest interest and aims of the state are necessarily involved, is quite as conservative as that of Wharton, and in striking contrast with other contemporary German writers like Heilborn and Ullmann.

[54] Circular of Prussian Minister of Commerce, Aug. 16, 1861, quoted by Niemeyer, *Urkendenbuch zum Seekriegsrecht*, I, 22.

[55] Moore, Digest, VII, 469. Richardson's Messages, VII, 87.

[56] Quoted by Niemeyer, 122.

[57] Niemeyer cites the appearance of the treaty in these official compilations as evidence that the United States regards them as still in force. Fleischmann says

tion can be found that the treaty was not binding upon Prussia down to the formation of the Empire, or upon the German Empire since that time, until the doctrine of *rebus sic stantibus* was raised against it in connection with the *Frye* case in Kohler's *Zeitschrift* in 1915, in the same number, indeed, in which Kohler asserted that international law based on international treaties can no longer be.[58]

With the outbreak of the great war, the United States as a neutral was entitled to the benefits and burdened with the duties as set forth in the treaty of 1828 and the articles of the earlier treaties revived therein. It was not the first time that this had been the case, for Prussia had been a belligerent in 1866 and 1870, as the United States had been a belligerent and Prussia a neutral from 1861 to 1866. The provisions of the treaty covering the relations of neutrality, therefore, stand together as a standard of rights and duties for Germany and the United States between August, 1914, and April, 1917. These provisions are contained in Articles 12 of 1785, 13 to 20 of 1799, and 13 of 1828. The first is the famous "free ships, free goods" article. Going beyond the traditional statement of this principle, the article provided for complete liberty for either party to trade with a nation at war with the other to the extent that free intercourse and commerce of the neutral should not be interrupted. "On the contrary, *as in full peace*, the vessels of the neutral party may navigate freely to and from the ports or on the coasts of all belligerent parties." The treaty of 1785 did not recognize blockade, as that of 1828 did (Article 13). Similarly, the first treaty did not recognize contraband, as the last one did, by renewing Article 13 of 1799. Therefore, these three articles must be reconciled, and they may be as follows: the merchant vessels of the United States as a neutral had the right to navigate freely to and from the ports and on the coasts of Great Britain and her allies, save when a lawful blockade of a port or ports, properly notified and effectively maintained, had been declared, unless indeed such vessels carried contraband, which was limited to arms, ammunition, and military stores.

that Niemeyer's statement has no bearing upon the question of the validity of the treaty as against Germany.

[58] Kohler, *Das neue Völkerrecht*. See English translation and foreword in Michigan Law Review, June, 1917.

Even then the contraband was not to be confiscated, but could be requisitioned and paid for or delivered out. The inference is that neutral prizes could not be destroyed. Furthermore, the implication of the contraband article is that neutral merchantmen had the right to arm, for the "quantity of arms necessary for the use of the ship," and proper for the use "of every man serving on board the vessel or passenger" was to be free. Merchant vessels of the United States were to be guaranteed regulation of visitation and search, in which process German naval officers and sailors were not to "molest or insult in any manner whatever the people, vessels, or effects of the other party" (Article 15 of 1799, renewed in 1828). In case of blockade (Article 13 of 1828) the neutral merchantman might be "captured or condemned," or "detained or condemned," but not until after it had had actual warning or imputed knowledge of the blockade. Furthermore, the ports only, and not the coasts or waters contiguous to belligerent territory, are mentioned as subject to blockade. These are special treaty-rights in favor of the neutral. No provision seeks to limit the exercise by neutrals of rights existing by the unwritten law of nations. Those mentioned are either declaratory of international law or concessions beyond it by the belligerent in favor of the neutral.

The duties of neutrals are comprised in Article 19 of 1799 (renewed in 1828) on asylum for prizes. As has been seen, this article antedated the development of all modern doctrines of neutral duties.[59] The phrase used in the English version of 1828 states that "the vessels of war . . . shall carry freely wheresoever they please the vessels and effects taken from their enemies." The French versions of 1828, 1799, and 1785 used the same phrase as is used in Articles 36 of the Franco-British treaty of 1713: "*Les vaisseaux de guerre . . . pourront en toute liberté conduire où bon semblera les vaisseaux et leur marchandises qu'ils auront pris sur les Ennemies.*" The idea that prizes taken should be

[59] "The right of a belligerent to bring his prize to a neutral friend's harbour, and even to sell her there, appears to have been unquestioned before the eighteenth century, but it gave rise to difficulties. . . . In 1709 a claim made by a foreign power to adjudicate upon Englishman's prizes brought to its harbours was declared (by the High Court of Admiralty) to be unfounded and contrary to the law of nations." Law and Custom of the Sea (Naval Records Society, 1916, ed. Marsden), II, Introd. xii, xiv.

conducted by the belligerent war-ship into a neutral port is expressed in every treaty which contains a provision for the asylum of neutral prizes, so that the interpretation put upon the clause, first by Mr. Secretary Lansing, and afterwards by the Federal Court in the *Appam* case, is in complete accord not only with the historic expression of the principle, but also with the obligations of neutrality in modern international law.

A distinction must be drawn between the operation of changed circumstances upon a prior treaty, and the operation of a rule of law developed after the treaty was made. Changed circumstances may render the treaty inoperative, as stated by Wharton and Schmidt. A changed rule of law, on the other hand, may result in the limited operation of the treaty through construction. In the *Appam* case the second situation was presented. Asylum for prizes was a doctrine antedating the development of the modern law of neutral duties. Therefore, the provision in the treaty was to be strictly construed as in derogation of international law.

The Hague Convention, XIII of 1907, containing provisions relating to asylum for prizes, was ratified by the German Empire, with reservations as to Articles 11, 12, 13, and 20. The United States ratified it, with reservations as to Article 23 and as to the meaning of Article 3. Great Britain, making reservations as to Article 23, signed but never ratified the convention. Article 28 states that the provisions of the convention were not to apply except as to contracting Powers, "and then only if all the belligerents are parties to the convention." This would seem to dispose of the contention that the Hague Convention, as such, superseded the apparently conflicting provisions of the treaty with Prussia. Neither the United States nor Great Britain, as a matter of fact, made any such claim. It was only as a rule of international law, "now generally recognized and embodied" in Articles 21 and 22 of Convention XIII of 1907, that the British Government sought to have it applied to the *Appam* case. Because Article 23, having been adopted by a great majority of states, was alleged to be declaratory of international law, Germany appealed to the convention. Both Great Britain and Germany, therefore, held that in part Convention XIII was declaratory of international law. Articles 21 and 22 were ir-

reconcilable with Article 23. Mr. Lansing adopted the former, and properly, as the United States by the actions of its delegation at The Hague and of the Senate had rejected the latter. Judge Waddill, in giving judgment for the owners of the *Appam*, followed the interpretation of the Prussian treaty and of the status of the Hague Convention taken by the Department of State, and this position was followed by the Supreme Court in affirming the judgment of the court below.[60]

Such being the principal provisions of the treaty respecting neutral rights and duties, it is somewhat surprising that they were not more frequently invoked by the United States while a neutral. The general silence of the American Government with reference to the treaty is significant. In the *Frye* case it was the German Government which suggested that Article 13 of 1799 (renewed in 1828) might govern. Thereupon the Secretary of State declared that the destruction of the *Frye* was a "violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia." It was, therefore, by virtue of its treaty-rights that the United States made claim for indemnity. No objection that the German lists of contraband were in opposition to the contraband list of 1799 (renewed in 1828) seems to have been made, nor was the claim made that destruction of neutral vessels was opposed to the treaty. More important is the omission of any reference to treaty-rights in Mr. Bryan's protest against Germany's proclamation of a war-zone around the British Isles. In no part of the German declaration of February 4, 1915, was the word "blockade" used or any phrase in any way describing a blockade. In the *Appam* case Germany claimed asylum under her alleged treaty-rights. The position of the United States that asylum for prizes is in derogation of international law, that the treaty article should be construed strictly, and that strict construction required that prizes be brought in by war-vessels, recognized the validity of the article but denied its applicability to the *Appam* case.

Only in general terms and incidentally did the United States refer to the repeated breaches of the treaty by Germany. In the first *Lusi-*

[60] The Appam case was fully discussed in the October number of this JOURNAL, 1916, 809–831. *Cf.* pp. 816–817.

tania note, May 13, 1915, Mr. Bryan called attention to the "explicit stipulations of our treaty of 1828," but founded no argument thereon. Many reasons may be found to explain this policy of silence with reference to what were plainly a series of violations of the treaty. A general standard of neutral rights was preferable to any special standard to be applied as against Germany, first, because Austria was properly to be held by the same standard as was Germany; second, that the same measure of neutral rights should be asserted against Great Britain as against Germany; and, finally, as the strongest and most important of the neutral nations, the United States should not claim special privileges for herself under the treaty, but seek to establish rights equally applicable to all neutral nations upon the broader basis of humanity. The submarine policy of Germany at once transcended the whole sphere of mere commercial regulations in time of war which the articles of the treaty having to do with neutrality sought to govern.

VI

THE TREATY SINCE APRIL 6, 1917

The provisions of the treaty fall into four classes: first, those which have to do with commercial intercourse in time of peace; second, those having to do with neutrality; third, those providing for a situation in which Germany and the United States should be at war together against a common enemy; fourth, those to be called into activity when Germany and the United States found themselves at war with each other. Upon the outbreak of war, April 6, 1917, the purely commercial regulations having to do with the regime of peace were, like all commercial treaties of that nature, abrogated. Those of the third class may be left to one side as irrelevant. Those of the second and fourth classes must be considered together, because the provisions which had to do with neutrality had a direct bearing upon those to be called into action after war began.

At first sight, Articles 23 and 24 of the treaty of 1785 (the first renewed in part in 1828, the second wholly renewed) seem to be separable from the rest of the treaty, because Article 24 concludes thus:

> And it is declared that neither the pretence that war dissolves all treaties nor any other whatever shall be considered as annulling this and the next preceding article; but, on the contrary, that the state of war as precisely that for which they are provided and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

There was such a persistent disregard of the articles of the treaty governing the rights of the United States as a neutral between August, 1914, and April, 1917, as to involve the whole treaty, because the same spirit underlies the whole. This position was seemingly recognized by Secretary Lansing, when, in answer to the proposal of the German Government, presented through the Minister of Switzerland, February 10, 1917, he stated that

> this Government is seriously considering whether or not the Treaty of 1828 and the revived articles of the treaties of 1785 and 1799 have not been in effect abrogated by the German Government's flagrant violations of their provisions, for it would be manifestly unjust and inequitable to require one party to an agreement to observe its stipulations and to permit the other party to disregard them. It would appear that the mutuality of the undertaking has been destroyed by the conduct of the German authorities.

Anticipating that the severance of diplomatic relations between the United States and Germany might lead to war, the German Government proposed that Article 23 of 1799 (renewed in 1828) should be reaffirmed. "This article," the German Foreign Office stated, "which is without question in full force as regards the relations between the German Empire and the United States, requires certain explanations and additions on account of the development of international law." Then was submitted the text of a special arrangement concerning the treatment of German and American nationals and their property in each other's territory after the severance of diplomatic relations. Germany proposed that German merchants in the United States and American merchants in Germany should be put on a par with the other persons mentioned in Article 23, namely, "all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind." Germans in the

United States and Americans in Germany, it was proposed, should be free to leave the country of their residence, taking with them their personal property, including money, valuables, and bank accounts, within times and by routes to be specified. Resident enemy aliens were to be protected in person and property, without restrictions as to private rights, upon a plane of equality with resident neutral aliens. Patent rights were not to be void, or their exercise impeded; contracts between Germans and Americans were not to be canceled, avoided, or suspended, except as such action might be had with reference to neutrals. A specific recognition of the Sixth Hague Convention with reference to the treatment of enemy merchant ships at the outbreak of hostilities was also requested.

This plan had been suggested to Ambassador Gerard before he left Berlin, and his unwillingness to acquiesce in it gave rise to embarrassment and serious interference with his ambassadorial rights and functions. In declining to consider the proposition of the German Government, forwarded through the Swiss Minister, Mr. Lansing rehearsed the repeated and gross violations of the treaties while the United States was a neutral, and called attention to the fact that since the severance of relations between the two countries, American citizens had been prevented from removing freely from Germany. "While this is not a violation of the terms of the treaties mentioned," wrote Secretary Lansing, "it is a disregard of the reciprocal liberty of intercourse between the two countries in time of peace, and cannot be taken otherwise than as an indication of a purpose on the part of the German Government to disregard in the event of war the similar liberty of action provided for in Article 23 of the Treaty of 1799 — the very article which it is now proposed to interpret and supplement almost wholly in the interest of the large number of German subjects residing in the United States and enjoying in their persons or property the protection of the United States Government."

Franklin's favorite article, looking toward the humane treatment of prisoners of war, was not referred to in the German proposition. As yet but few opportunities have been offered for the purpose of testing this provision. In no sense, if we may believe the reports made upon the treatment of Allied prisoners in German prison camps, has the

spirit of Franklin's article been maintained toward the unfortunate French, British, and Russian prisoners of war; and there is no reason to believe from the reports which have been made of the treatment of the few Americans already in German camps that a new standard would be set up for Americans.

To the extent that Articles 23 and 24 are declaratory of international law, no one suggests that their provisions will be departed from by the United States, unless by way of reprisal. Nevertheless, the treaty as a whole is at an end. Conceived in the spirit of eighteenth-century enlightenment, phrased by Franklin and Adams "according to the laws of Nature and of Nature's God," the Prussian treaties have been diametrically opposed to the doctrines of an infallible State which justifies its policy under the guise of necessity. When the German armies invaded Belgium, they did so at the behest of a government which claimed that state policy was supreme over treaty faith. Until that policy is overthrown, treaties with such a state cannot exist. The statement of Kohler that "an international law based upon international treaties can no longer be," is a statement of Prussian policy against which the United States and the Allies are fighting: for the vindication of the doctrine that international society based upon international law and international treaties is the only international society worthy of the name. The general principles of Franklin's treaty have, in the main, remained unchanged. It is Germany that has changed. The treaty has fallen to the ground because of the Prussian doctrine that not even the most sacred treaties may stand in the way of the policy of the Prussian State.

JESSE S. REEVES.

COMMUNITY FINES AND COLLECTIVE RESPONSIBILITY

(Being Part XIII of Some Questions of International Law in the European War, continued from previous numbers of the JOURNAL.)

THE theory of collective responsibility for offenses committed by the civil population of occupied districts against the authority of the occupying belligerent has been interpreted in a wider sense and applied on a more extensive scale by German military commanders during the present war than was ever done in any war of the past. The punishments imposed in the application of the theory have been unprecedented in number, sometimes novel in form and often excessive in character. They have consisted of pecuniary fines, either direct or under the guise of contributions, the seizure and shooting of hostages, the burning of towns and villages, the destruction of private houses, the deportation of the civil population, the commercial isolation of refractory towns, the interdiction of public charitable relief to the unemployed, the confinement of the inhabitants within doors for certain periods, and the like.[1] It is the main purpose of this paper to review German theory and practice in respect to the first mentioned of these punitive expedients.

As a general principle, the right of a military occupant to impose, under certain conditions, pecuniary and other punishments upon occupied districts, for acts committed by the civil population against his authority, has long been recognized and acted upon in practice. Among the earlier instances of a resort to such a measure was the action of Napoleon, who, during his occupation of Lombardy in 1796, announced that any district under his occupation, in which firearms were found in possession of the inhabitants, should be liable to a fine equal to one-third its revenue (presumably the annual revenue).[2] A like penalty

[1] Some instances in which the three last mentioned expedients have been resorted to by the Germans in the present war were considered in my article on "Contributions, Requisitions and Compulsory Service in occupied Territory" in the January number, 1917, of this JOURNAL, especially pp. 104 ff.

[2] Hall, International Law, 4th ed., p. 492.

was threatened against any village in which a French soldier had been killed, unless the individual perpetrator of the crime was arrested and delivered up to the local authorities.[3]

It was not until the Franco-German War of 1870–71, however, that the theory of collective responsibility was applied on an extensive scale and interpreted to cover offenses for which the population punished could not have been justly held responsible. In August, 1870, a general order was issued by the Prussian military authorities decreeing that French communes in which hostile acts were committed against their authority by persons not belonging to the French army should be liable to a fine equal to the amount of the local land tax, and that those communes from which individual offenders came should be liable to the same punishment.[4] In October of the same year it was announced that communes in which damage was done to railways, bridges, canals and telegraph lines, even when the mischief was wrought by others than the local inhabitants and without their knowledge and connivance, should be held responsible for such acts.[5]

These announcements turned out to be more than empty threats, for in fact huge fines were imposed and collected in many instances. Thus Lorraine, in addition to other penalties, was fined 10,000,000 francs for the destruction of a bridge with the alleged connivance of the inhabitants.[6] In June, 1871, the village of Bray was fined 37,500 francs and hostages were taken to insure the payment of the fine.[7] Combles was required to pay 325,000 francs for an offense not mentioned in the accounts, and Driencourt was assessed 1000 francs because a stranger was found in the village.[8] The commune of Launois

[3] Hall, International Law, 4th ed. p. 491.

[4] Concerning this order see Bonfils, *Droit International*, sec. 1219; Calvo, *Droit International*, sec. 2236; Spaight, War Rights on Land, pp. 408–409; Merignhac, *Lois et Coutumes de la Guerre sur Terre*, sec. 106; Nys, *Droit International*, Vol. III, p. 429; Despagnet, *Cours de Droit International*, sec. 589; Bluntschli, *Droit Int. Cod.*, sec. 643 bis. The text of the above mentioned order may be found in the *Revue de Droit International et de Lég. Comp.*, Vol. II, p. 666; see the defense of this order, by Loening, *ibid.*, Vol. V, p. 77.

[5] Edwards, The Germans in France, pp. 76, 211.

[6] Edmonds and Oppenheim, The Laws and Usages of War in the British Manual of Military Law (ed. of 1914), p. 305.

[7] Pradier-Fodéré, *Traité de Droit Int.*, Vol. VII, p. 281. [8] *Ibid.*, p. 279.

was forced to pay 10,000 francs to the families of two Prussian dragoons who were alleged to have been killed by *francs-tireurs*.[9] Châtillon was fined 1,000,000 francs for the destruction of a bridge [10]; Etamps, 40,000 francs for the cutting of a telegraph wire [11]; Orleans, 600,000 francs on account of the killing of a Prussian soldier by an unknown person during an altercation between himself and the soldier.[12] St. Germain was given the option of paying a fine of 100,000 francs or of being burned because three German dragoons had disappeared from the community.

In some instances impositions were levied which in form and pretext were fines, but which in reality were contributions in disguise. The enormity of the amounts and their disproportion to the offenses alleged would seem to leave no doubt as to this.[13] Thus, the Department of the Seine was assessed 24,000,000 francs and Rouen was required to raise 6,500,000 francs within five days.[14] The Departments of Aisne, Ardennes and Aube were compelled to pay 3,000,000 francs as a punishment for the action of the French in taking as prisoners of war the crews of captured German merchant vessels and for expelling Germans from France. The Departments of Meurthe, Meuse and Seine-et-Marne were assessed 2,755,253 francs on the same account.[15] A contribution, which was intended as a punitive measure, was the levy in December, 1870, of 25 francs per capita on the inhabitants of all the occupied districts of France with the avowed purpose of breaking the resistance of the French people and of inducing them to sue for peace.[16]

[9] Spaight, *op. cit.*, p. 409.

[10] Bonfils, *op. cit.*, sec. 1219; Ferrand, *Des Réquisitions*, p. 239, and Guelle, *Précis des Lois de la Guerre*, Vol. II, p. 221. Guelle states that the village of Ham was fined 25,000 francs because the fortress was retaken from the Germans by a detachment of regular French troops. See also Latifi, Effects of War on Private Property, p. 34, and Rouard de Card, *La Guerre Continentale*, p. 178.

[11] Guelle, p. 221.

[12] Bonfils, *op. cit.*, sec. 1219, and Depambour, *L'Occupation en Temps de Guerre*, p. 119.

[13] Compare Guelle, Vol. II, p. 221.

[14] Depambour, p. 119, and Rouard de Card, p. 178.

[15] Calvo, *op. cit.*, Vol. IV, sec. 2236. Bismarck considered the action of the French to be a violation of international law, but as the law then stood, the crews of merchant vessels were liable to be treated as prisoners. Compare Edmonds and Oppenheim, in the British Manual, sec. 459, note b.

[16] Bonfils, sec. 1222, and Ferrand, *Des Réquisitions en Matière de Droit Int.*, p. 221. Other instances of fines imposed are mentioned by Andler in his brochure,

Punishments other than fines were laid in some instances. Thus, when the railroad bridge over the Moselle between Nancy and Toul was blown up, whether by civilian inhabitants or French troops is not clear, the town of Fontenoy was burned by the Germans.[17] At Charmes the town casino was burned as a punishment for the act of the inhabitants in firing upon the escort of a convoy of prisoners.[18]

The German theory of collective responsibility was revived by Lord Roberts and General Kitchener in the South African War, when communities were held responsible and were punished not only by heavy fines but by wholesale burning of farms, the destruction of private houses and the imprisonment of the leading civil inhabitants, for damages committed upon railway and telegraph lines by "small parties of raiders." It is not clear whether the offenders were lawful belligerents or non-combatants; in the former case their acts were not violations of the laws of war and therefore they were not legally punishable.[19] In any case the measures resorted to were extremely severe and of very doubtful expediency, as such measures always are, because they tend to drive the enemy to desperation, embitter the whole population and thus retard rather than hasten the termination of the war. Such measures were not resorted to during the Chino-Japanese, the Spanish-American, nor the Russo-Japanese Wars, and apparently not during the more recent Turco-Italian and Balkan Wars.

During the present war the Germans have, as already stated, extended the theory of collective responsibility and applied it on a larger scale and under a greater variety of forms than was ever done in any previous war.[20]

Les Usages de la Guerre et la Doctrine de l'Etat-Major Allemand, p. 25, and by Saint Yves, *Les Responsabilités de l'Allemagne dans La Guerre de 1914*, pp. 383 ff.

[17] Spaight, p. 122, and Guelle, p. 221. Pillet (*Le Droit de la Guerre*, p. 236) declares that the bridge was destroyed, not by civilians, but by French troops; consequently it was a legitimate act of warfare.

[18] Edmonds and Oppenheim, *op. cit.*, p. 305, note b.

[19] Spaight, p. 124; Bordwell, p. 150. See especially the proclamation of Lord Roberts of June 14, 1900, announcing that houses and farms in the vicinity of places where damage was done would be burned; and that of General Maxwell of June 15, 1900, declaring that in case telegraph wires were cut or railway bridges destroyed the farm nearest the place where the act was committed would be burned.

[20] With a view to establishing the liability of Belgian communes for damages

The following instances, the facts regarding which seem to be sufficiently established, illustrate fairly well the German theory and practice:

In November, 1914, the city of Brussels was fined 5,000,000 francs by General von Leutwitz for the act of a policeman in attacking a German officer during the course of a dispute between the two, and for facilitating the escape of a prisoner.[21] In July, 1915, another fine of 5,000,000 francs was reported to have been imposed upon Brussels for the alleged destruction of a German Zeppelin by a British aviator at Eyre near Brussels.[22]

According to a press despatch of November 8, 1914, from The Hague, the affair which led to the imposition of the first mentioned

done by the inhabitants and for determining the amounts for which they should be held responsible, the Governor-General of Belgium in August, 1914, revived and declared in force the old French law of 1795, which makes the communes responsible for damages caused by riots and public disorders therein. The claim of the Governor-General to do this was based on the fact that the law in question was enacted when what is now Belgium was a part of France and had never been repealed by the Belgian Parliament. The original purpose of the law of 1795, however, was to establish the responsibility of the communes for damages caused by riots and public disturbances (*attroupments*) in time of peace and not those caused by acts of individuals in time of war in territory occupied by the enemy. There is no analogy, therefore, between the responsibility contemplated by the French law and that which the Governor-General of Belgium sought to establish. Compare Pillet, *Le Droit de la Guerre*, p. 235. By a decree of July 3, 1915, the Governor-General created in each province a special tribunal charged with the enforcement of the earlier decree. The tribunals were empowered to examine witnesses, employ experts, conduct investigations and to fix the amount of the damages wrought, which amount was to be paid by the commune to the provincial treasurer within ten days, who was thereupon required to transmit the amount to the parties injured. Text in Huberich and Speyer, German Legislation in Belgium, 2d series, pp. 57–59. On the face of it, the primary purpose of this measure was to provide a means for indemnifying the Belgian population, but it is not improbable that it was also intended to provide machinery for punishing communes for acts of hostility committed by individuals against the authority of the occupying forces.

[21] The notice imposing the fine was posted at Brussels, November 1, 1914. The text may be found in various collections of proclamations issued in Belgium, among others the Report of the Belgium Commission of Inquiry. The notice states that the policeman in question was sentenced to imprisonment for a term of five years and that "The city of Brussels, excluding suburbs, has been punished for the crime committed by its policeman De Ryckere against a German soldier, by an additional fine of five million francs."

[22] The application of the principle of collective responsibility in this case seems so extraordinary that one is tempted to doubt the authenticity of the report.

fine grew out of the attempt of the German military authorities to prevent the sale of "contraband" newspapers. A German secret service agent, it appears, undertook to arrest certain Belgians for selling Dutch newspapers contrary to the regulations; the latter resisted arrest and were supported by the policeman in question who, it is alleged, attacked the German officer. The Brussels municipal council protested against the fine, among other reasons, because the military authorities had not notified the local news-dealers of the order prohibiting the sale of Dutch newspapers, and because the persons who resisted arrest did not know that the secret service agent was a German officer.

In July, 1915, Brussels was again fined 5,000,000 marks in consequence of a "patriotic demonstration" by the inhabitants on July 21st, the national holiday, the "moderate size of the fine imposed being due to the loyal coöperation of the municipal authorities in preserving order."[23] The mayor addressed a protest to the Governor-General, von Bissing, in which he denied the right of a military occupant to punish the civil population for manifesting their sentiments of patriotism on the occasion of the celebration of their national independence.[24]

Early in 1916 Brussels was fined 500,000 marks, and the suburb

[23] Lieutenant-General Hut, German Governor of Brussels, in a letter to the mayor, stated that the municipal authorities had given their approval to the regulations prohibiting all public demonstrations, meetings, processions and display of flags on the fête day of July 21st, but that in spite of this agreement, late in the evening disturbances were created by the distribution of tracts urging the people to disregard the regulations. During the evening Cardinal Mercier drove through the streets, and his appearance led to demonstrations "which were contrary to the German regulations and which had the effect of inciting the people to rebellion or foolish deeds." "No occupying Power," said General Hut in his letter to the mayor, "would bear a similar challenge. I therefore proposed to the Governor-General to fine the community. The Governor accepted the proposal and imposed a fine of 5,000,000 marks. The Governor remarked: 'It is only in consideration of the loyal coöperation of the municipal authorities in preserving order that the fine laid is so moderate.'" Massart (Belgians under the German Eagle, p. 275) says the Germans even went to the length of announcing that the closing of stores on the national holiday would be regarded as a forbidden "demonstration," but this portion of the order they were unable to enforce in Brussels or elsewhere.

[24] The town of Lierre was fined 57,500 francs for a similar "demonstration" on the same day, the chief offense, it is alleged, being the raising of a Belgian tricolor on the top of an oak tree.

of Schaerbeek 50,000 marks, in consequence of the murder by an unknown person of a young Belgian in the latter commune on the night of January 6th.[25] Brussels was held partly responsible because the crime was alleged to have been committed with a revolver obtained in that city, notwithstanding the fact that the German authorities had, on January 1st, issued a proclamation requiring all persons to deliver up their fire arms and munitions at the city hall, and threatening with the death penalty those found with arms in their possession after a fixed date.[26] The proclamation also notified the inhabitants that communes in which such persons were found would be fined 10,000 marks for every offender taken therein.

Numerous towns and cities were fined for the alleged firing by *francs-tireurs* and civilians upon German troops and for other offenses against the occupying authorities. Thus Louvain was fined 20,000,000 francs in consequence of shots alleged to have been fired by civilians.[27]

A levy of 60,000,000 francs was made upon the Province of Liège shortly after it fell under the occupation of the Germans, but it is not quite clear whether it was intended as a fine or a contribution.[28] Subsequently a levy of 10,000,000 francs was imposed on the city of Liège in consequence of the alleged firing of shots from private houses upon German troops. Mons was compelled to pay 100,000 francs for the firing by an unknown person upon a German soldier, and the town

[25] The murdered Belgian was said to have been the person who had furnished the German authorities with information which led to the arrest and execution of Miss Edith Cavell, an English nurse, on the charge of assisting English soldiers to escape from Belgium. He was, therefore, regarded by the Belgian people as a traitor and his murder was apparently brought about by a secret society which had sworn vengeance against Miss Cavell's betrayer.

[26] Compare the following from a proclamation, issued in October, 1915, by General Sauberweig:

"If, after October 25th, arms and ammunition are found in possession of any inhabitants those persons will be liable to the death penalty, or to hard labor for at least ten years, while the communities will be fined up to 10,000 francs for each case."

[27] The German White Book, *Die Völkerrechtswidriger Führung des Belgischen Volkskriege*, p. 241 says, however, that it was impossible to collect this fine.

[28] It is variously described in the press despatches as a "fine," a "contribution," and a "war levy." It makes little difference whether technically it was a fine or a contribution, for many of the "fines" imposed by the Germans were in fact "contributions" in disguise.

was threatened with another fine in case a certain Englishman should be found within its limits.[29] The town was threatened with another fine in case any inhabitant should be found within its limits with benzine or a motor cycle in his possession, and a similar threat to fine the Province of Hainaut for the same offense was made.[30] In June, 1917, Mons, according to the press dispatches, was again fined 500,000 francs because a Belgian paper published in Holland stated that Crown Prince Rupprecht of Bavaria was in Mons when the city was bombarded by Allied airmen.[30]

Tournai is said to have been fined 3,000,000 francs for the killing of a Uhlan.[31] Merris and La Gorgue were each fined 50,000 francs for the firing of shots at German troops; the village of Marson (population 300) 3000 francs, and the commune of Warnelon 10,000 francs for the same offense.[32] The commune of Cortemarck was fined 5000 marks on the pretext that one of the inhabitants had committed espionage by making signals to the enemy.[33] In the case of Marson, the Germans promised "to burn only a part of the village in the event the fine was duly paid."

On January 16, 1915, the Belgian Legation at Washington issued a public statement charging the Germans with having imposed a fine of 10,000,000 francs on the city of Courtrai, not for the disobedience of the inhabitants, but for obeying the orders of the military commander.[34]

[29] Massart, Belgians under the German Eagle, p. 147. Proclamation posted at Mons, November 6, 1914.

[30] Proclamation posted at Mons, Oct. 6, 1914, Massart, p. 147.

[30a] New York *Times*, June 8, 1917, despatch from Amsterdam. Were there not clearly established instances of the imposition of fines by the Germans in other cases where the element of community guilt was totally lacking, one would be inclined to regard this dispatch as a joke.

[31] London *Times*, September 25, 1914.

[32] Ferrand *Des Réquisitions en Matière de Droit Int.* (1917), p. 415, and Morgan, German Atrocities, p. 85. Morgan asserts that these levies were not fines in reality, but "pure extortions levied on mere pretense."

[33] Text of the notice, in Massart, p. 153. The curé and the vicar of the commune were held "responsible for the members of the parish" and were punished by deportation to Germany.

[34] According to the Belgian version, the inhabitants had been ordered by two German officers shortly after the occupation of the city to deliver up their arms in the tower of Broel. Subsequently a new commander arrived who charged that the

For the cutting of a telephone wire by unknown persons at Arlon, the town was fined 100,000 francs and given four hours in which to raise the amount, in default of which 100 houses were to be pillaged. Before the sum was raised 47 houses are alleged to have been sacked.[35] The commune of Puers was fined 3000 francs for a similar offense. The local authorities, however, claimed that the wire had not been cut, but had given way through wear. Other towns fined on the charge that the telegraph or telephone systems "did not work properly" were Ghent, 100,000 marks; Ledebourg, 5000 marks; Destelbergen, 30,000 marks; Schellebelle, 50,000 marks; Sweveghem, 4900 marks; Winckel Sainte-Croix, 3000 marks; and Wachtebeke, 3000 marks.[36] Seraing was fined because a bomb had burst within the limits of the commune, and Eppeghem was punished (by a fine of 10,000 francs) on the charge that a peasant had fired a shot at a hare or a pigeon.[37]

A fine of 20,000 marks was imposed on the town of Malines for the failure of the mayor to notify the military authorities of a journey which Cardinal Mercier had made in violation of the German regulations concerning the circulation of automobiles.[38] The same town was threatened with a fine in case the authorities did not furnish the Germans within 24 hours a list of the employés of the railway administration in order that they might be requisitioned for labor.[39]

arms had been clandestinely deposited at the tower without instructions from the military authorities. The city was thereupon fined 10,000,000 francs. Von Mach (Germany's Point of View, p. 195) ridicules the Belgian explanation, and defends the imposition of the fine as a legitimate and humane punishment.

[35] Reports on Violations of the Laws and Customs of War in Belgium, preface by J. Van Den Heuvel, p. xxvi; also p. 58; see also Saint Yves, *Les Responsabilités de l'Allemagne dans la Guerre de 1914*, p. 385.

[36] Massart, p. 146, quoting the *Nieuwe Rotterdamsche Courant* of January 30, 1915.

[37] Massart, pp. 147–148. The Belgian accounts charge that the shot was in fact fired by a German soldier while walking in the country. Hostages were taken to insure the payment of the fine, but as there was no money in the communal treasury, the hostages were subsequently released and apparently the fine was remitted.

[38] Annex IV to Cardinal Mercier's address to the Cardinals, Archbishops and Bishops of Germany, Bavaria and Austria-Hungary, published in a brochure entitled "An Appeal to Truth," p. 26.

[39] The mayor replied that the local authorities, not being charged with the administration of the railways, did not possess the information demanded.

Antwerp is said to have been fined 25,000 francs because an unknown person altered the letters in a public notice posted by the Germans announcing the capture of 52,000 Russians and 400 guns, so as to make it read "52,000 sparrows and 400 nuns." [40]

The village of Grenbergen was assessed 5000 francs because an inhabitant allowed his pigeons to fly in violation of the military regulations. [41]

On August 22, 1914, General von Nieber imposed a fine of 3,000,000 francs on the town of Wavre (population 8500) for the "unqualified behavior, contrary to the law of nations and the usages of war, of the inhabitants in making a surprise attack on the German troops." The town was given a week in which to raise the amount. In a letter of August 27, General von Nieber informed the mayor as follows: "I draw the attention of the town to the fact that in no case can it count on further delay, as the civil population has put itself outside the law of nations by firing on the German troops. The city will be burned and destroyed if the fine is not paid in due time, without regard for any one; the innocent will suffer with the guilty."[42] The Belgian accounts state that in consequence of the inability of the town to raise the amount a large number of houses were burnt.[43] Professor Waxweiler affirms that the civil population took no part in the hostilities and that a medical inquiry established the fact that the German soldier who had been wounded during the course of the affair received his wound from a German bullet.[44]

Lessines is alleged to have been subjected to a "heavy fine" because the women of the town declined to do military work for the Germans. Other towns were fined or otherwise punished for the refusal of the inhabitants to perform what the Belgians regarded as military work or for attempting to dissuade their fellow citizens from performing

[40] Massart, p. 148.

[41] *Ibid.*, p. 147.

[42] Text in the Belgian Reports on Violations, etc., p. 37. See also Dampierre, *l'Allemagne et le Droit des Gens*, p. 148, and Saint Yves, *op. cit.*, p. 385. Some of the accounts say the fine was imposed by General von Bülow.

[43] Facts about Belgium, p. 7. Grasshoff, a German writer (The Tragedy of Belgium, p. 173), alleges, however, that the threat was not executed and that the city was spared from burning.

[44] Belgium, Neutral and Loyal, p. 281.

such labor.[45] Collective fines (10,000 francs in each case) were also threatened for the failure of the owners of horses to bring in their animals at the direction of German agents who were sent to Belgium to requisition horses for transportation to Germany. Besides, an individual fine of 500 francs was to be imposed upon each owner who refused to comply with the order.[46]

During the autumn of 1916 many towns and communes were fined in consequence of the refusal of the civil authorities to furnish the Germans with lists of the "unemployed" whom the military authorities were then deporting in large numbers to Germany for compulsory labor. Thus, Bruges was threatened with a fine of 150,000 marks for each day's delay in the furnishing of such a list. The authorities refused to furnish the list, and the fine was imposed and paid.[47] Tournai, which had already in 1914 been fined 3,000,000 francs for the killing of a German Uhlan, was now assessed 200,000 marks for the refusal of the civil authorities to furnish the Germans with a list of all the male inhabitants of the town, and a further fine of 20,000 marks was threatened for each day's delay in the furnishing of the information demanded.[48]

[45] Some instances are mentioned in my article in the January, 1917, number of this JOURNAL, pp. 103 ff. The Belgian Government furnished a correspondent of the New York *Times* a facsimile copy of the following military notice addressed to the population of the village of Ledeberg, near Ghent:

Ghent, 16th December, 1915.

To the Mayor of Ledeberg:

The following is Paragraph 4 of the regulations dated 12th October, 1915:

It is forbidden to the inhabitants of Ledeberg parish to use the public streets between 7 P.M. and 8 A.M. from 17th December till 24th December, 1915, inclusive. You are directed to inform the public immediately of the present regulation.

Furthermore, you are informed herewith that police measures and fines will follow in case the workmen requisitioned for the railway workshops at Ledeberg persist in their refusal to resume work on account of the German military administration.

Commandant d'Etape, Von Wick.

[46] See my article in the January, 1917, number of this JOURNAL, p. 90; also Ferrand, *Des Réquisitions*, p. 437.

[47] London *Times* (weekly ed.), Nov. 3, 1916.

[48] New York *Times*, November 18, 1916. Major-General Hoppfer, who imposed the fine, replied in a letter of October 23d to a resolution of the municipal council declining to furnish the list, as follows: "The fact that the municipal

In some instances confiscations under the guise of fines appear to have been imposed on private individuals of wealth. Thus Baron Lambert de Rothschild is said to have been "mulcted" for 10,000,000 francs, and M. Solvay, the well-known Belgian manufacturer, was compelled to pay 30,000,000 francs.[49]

In the occupied districts of France the same policy was followed by the Germans, and many towns and communes were fined for acts alleged to have been committed by the inhabitants against the authority of the occupying forces. Thus, in August, 1914, the commune of Lunéville was fined 650,000 francs for an alleged attack by certain of the inhabitants against the German troops.[50] The French authorities, however,

council allows itself to oppose the orders of the military authorities in occupied territory constitutes an act of arrogance without precedence and is an absolute misunderstanding of the situation arising from the state of war.

"The state of affairs is clearly and simply this: The military authority commands and the municipality has to obey. If it fails to do this, it will have to support the heavy consequences which I have already pointed out in my previous explanation.

"The commander of the army has imposed on the town for its refusal to supply the required lists a fine of 200,000 marks, which has to be paid within the next six days, and he further adds that until the required lists have been put at his disposal the sum of 20,000 marks will have to be paid for every day of delay. This will hold good until December 31."

[49] Sarolea, How Belgium Saved Europe, pp. 140–1. Sarolea refers to these exactions as "fines" without stating what the offenses were for which they were laid. Apparently they were nothing more than acts of confiscation.

[50] The following notice concerning the fine was posted by the German authorities throughout the commune:

"On the 25th August, 1914, the inhabitants of Lunéville made an attack by ambuscade against the German columns and transports. On the same day the inhabitants fired on hospital buildings marked with the Red Cross. Further, shots were fired on the German wounded and the military hospital containing a German ambulance. On account of these acts of hostility a contribution of 650,000 francs is imposed on the commune of Lunéville. The mayor is ordered to pay this sum — 50,000 francs in silver and the remainder in gold — on the 6th of September at 9 o'clock in the morning to the representative of the German military authority. No protest will be considered. No extension of time will be granted. If the commune does not punctually obey the order to pay 650,000 francs, all the goods which are available will be seized. In case payment is not made, domicillary searches will take place and all the inhabitants will be searched. Anyone who shall have deliberately hidden money or shall have attempted to hide his goods from the seizure of the military authorities, or who seeks to leave the town, will be shot. The mayor and hostages taken by the military authorities will be made responsible for the

emphatically denied the truth of the charge, and accused the Germans not only of having themselves fired the shots complained of, but with having also massacred 18 inhabitants of the town and burned 70 houses.

Upon the occupation of Rheims, the Germans levied an "exorbitant indemnity" on the city, but it is not clear whether it was intended as a fine or a contribution. The amount was finally cut down to 150,000 francs in gold and a quantity of supplies of the value of 800,000 francs. Hostages were taken to insure the payment within four days of the sum required.[51]

Lille was fined 500,000 francs because the inhabitants made a demonstration of sympathy for a detachment of French prisoners who were being escorted through the streets by a German military guard. The city was allowed one week in which to raise the amount of the fine.[52]

The town of Epernay was fined 176,550 francs in September, 1914, for not having delivered within the time specified certain supplies which the German military authorities had requisitioned for the use of their troops. The notice of the fine was accompanied by a threat to "take the most rigorous proceedings against the population itself and to conduct forcible perquisitions in the houses of the inhabitants" in case the amount was not paid on the following day. The mayor protested against the fine on the ground that certain of the supplies requisitioned (notably 12,000 kilogrammes of salted bacon) were not to be found in the town although he had used all his endeavors to procure them. The German authorities could not, however, be induced to

exact execution of the above order. The mayor is ordered to publish these directions to the commune at once."

Hénaménil. 3d September, 1914.
Commander-in-Chief, Von FASBENDER.

The text of this notice may be found in the Report of the French Official Commission of Inquiry on Violations of International Law in French Territory occupied by the Enemy, *Journal Officiel*, January 8, 1915. A facsimile reproduction in French may be found in a collection entitled Scraps of Paper: German Proclamations in Belgium and France (p. 11), published by Hodder and Stoughton, London, 1917; in Dampierre, *l'Allemagne et le Droit des Gens*, p. 149; and in various other publications.

[51] Wood, The Note Book of an Attaché, p. 168.

[52] Press dispatches of March 12, 1915. The Department of the Nord had already been subjected to a contribution of 15,000,000 francs, in addition to a monthly contribution of 2,000,000 francs. About half of the burden fell upon Lille. Lille, *Sous le Joug Allemand* (Paris, 1916), p. 4.

relinquish the fine or reduce the amount, and an appeal was made by the mayor to the inhabitants to raise the sum demanded.[53] The amount was collected and turned over to the German authorities at 5 o'clock on the day fixed.

Erbéviller and other places were fined on the charge that shots were fired by civilians at German soldiers.[54]

A curious application of the German theory of collective responsibility was the reported imposition of a fine on Lens in consequence of the bombardment of the town by the Entente Allies during its occupation by the Germans. It appears from the news dispatches that the punishment was based on the assumption that certain of the inhabitants must have been in communication with the enemies of Germany and induced or invited the bombardment. Six shells fell on the railroad station, for each of which a fine of 3750 francs was imposed.

Punishments other than pecuniary fines were as in Belgium laid upon French towns in various instances.[55]

In other territories occupied by the Germans the policy of collective responsibility and punishment was applied as in Belgium and France. Thus, a fine of 50,000 rubles (about $25,000) was imposed on the inhabitants of the Russian town of Windau, the amount being worked out by the inhabitants on the roads, bridges and farms. Vilna was fined 75,000 marks in consequence of a fire alleged to have been started by one of the inhabitants. Soon after their occupation of Russian Poland, the Germans, in retaliation for the alleged destruction by Russian troops of private property in East Prussia, announced that Polish towns occupied by them would be heavily fined, and for every village burned by the Russians in German territory and for each estate destroyed, three villages or estates in Russian territory would be sacrificed to the flames.

[53] Facsimile reproduction of the order in Scraps of Paper, etc., p. 23; see also Matot, *Rheims et la Marne, Almanach de la Guerre*, p. 169.

[54] Saint Yves, *op. cit.*, p. 387.

[55] Thus the entire population of Roulers was compelled to remain indoors from 2 P.M. until 8 P.M. every day for three weeks because one of the inhabitants was found guilty of giving food to Russian prisoners employed by the Germans at work in the vicinity of the town. London *Times* (weekly ed.), June 23, 1916, quoting from the Amsterdam *Telegraf*.

Upon their occupation of Bucharest in December, 1916, a heavy pecuniary imposition was levied upon the Roumanian capital, and a similar exaction amounting to 50,000,000 francs is said to have been laid on the town of Craiova.[56] In June, 1917, a fine of 250,000,000 francs was imposed in the occupied territory of Roumania.[56a]

It is probably safe to assume that the charges against the Germans for levying exorbitant fines upon communities, like many other charges made against them, have been exaggerated, and that in some instances where pecuniary exactions were actually levied they were not intended as punitive measures, but were contributions levied ostensibly, at any rate, for the "needs of the occupying troops." [57] Nevertheless, when reasonable allowance has been made for exaggeration and errors of statement, there remains sufficient evidence of a reliable character to warrant the conclusion that the charges are in the main true, and that a policy of pecuniary repression has been carried out on so large a scale as to afford some basis for the assertion that it partook of the character of spoliation.

We may now examine in the light of the international conventions, the opinions of the text writers and the principles of the criminal law the question of the legality of the German policy. The great majority of American, English and French writers on international law have condemned as arbitrary and contrary to the elementary principles of justice the theory of collective responsibility as it was applied by the Germans in many instances during the war of 1870–71, particularly where it was applied to districts other than those in which the offense was committed, where the amount of the fine was out of all proportion

[56] London *Times* (weekly ed.), Dec. 15, 1916. These levies were variously described in the press dispatches as "contributions," "war levies" and "fines." It is impossible to determine their technical character, nor is this important, for the reason that the Germans do not seem to have observed strictly the distinction between fines and contributions.

[56a] New York *Times*, June 26, 1917.

[57] Von Mach ventures the explanation that many of the so-called "indemnities" levied by the Germans were nothing more than taxes imposed for meeting the expenses of the civil administration. Germany's Point of View, p. 194. In this article I have made a conscientious endeavor to avoid confusing fines with contributions and taxes, and with one or two exceptions where there is doubt as to the exact character of the imposition, I have dealt only with fines.

to the gravity of the offense, where the acts complained of were committed not by the civil population but by the regular troops of the enemy, as appears to have sometimes been the case, and where the fines levied were imposed for the psychological purpose of inducing the population to cease their resistance and sue for peace.[58]

Even a few German writers, such as Bluntschli,[59] Geffcken,[60] Loening [61] and apparently Albert Zorn, admit that in some instances the

[58] See, for example, Bordwell, Law of War, p. 317; Lawrence, Principles, p. 448; Spaight, *op. cit.*, p. 408; Westlake, International Law, Vol. II, p. 96; Bonfils, *op. cit.*, sec. 1219; Despagnet, *op. cit.*, sec. 589; Ferrand, *Des Réquisitions*, pp. 239 ff.; Feraud-Giraud, *Des Réquisitions Militaires*, p. 17; Merignhac, *Les Lois et Coutumes*, sec. 106; Nys, *Droit Int.*, Vol. III, p. 429; Guelle, *Précis*, Vol. II, p. 219; Latifi, *op. cit.*, p. 34; Pillet, *Le Droit de la Guerre*, pp. 234 ff. See also Calvo, *op. cit.*, Vol. IV, sec. 2172, and G. F. DeMartens, *Traité*, Vol. III, p. 265. Rolin Jaequemyns, a Belgian jurist, defends in general the German policy of 1870–71, although he condemns as unjustifiable the punishment of communes other than those in which offenses were committed. See the *Revue de Droit Int. et de Lég. Comp.*, Vol. II, pp. 666 ff. and Vol. III, pp. 311 ff.

[59] *Droit Int. Cod.* (Fr. trans. by Lardy), sec. 643 bis.

[60] See his note (no. 7) to sec. 126 of Heffter where he says it must be admitted that the Germans went beyond the necessities of the war in holding responsible distant communes from which the offender originally came. Their action in compelling the municipal authorities to furnish information to the nearest military commander concerning infractions and in punishing communes for giving shelter to offenders, Geffcken says was unjustifiable, since the occupying belligerent has no right to require the civil authorities to act as agents for the commanders of the invading army.

[61] See his article *l'Administration du Gouvernement-Général de l'Alsace Durant la Guerre de 1870–71* in the *Revue de Droit Int. et de Lég. Comp.*, Vol. V (1873), p. 77. Loening defends the action of the Germans in imposing a fine equal to the amount of the local land tax on districts in which offenses were committed against the safety of the German army by persons not belonging to the French army. The effect he says was "remarkable" and was the means of preventing many wrongs. "It therefore marked a great progress in the penal law of war." He also defends the 25 franc per capita levy for the purpose of breaking the resistance of the French and bringing pressure on them to sue for peace. But the Germans went too far, he says, when they extended the principle of collective responsibility to communes from which the offenders came, because in most cases there was no relation between the offense and the commune punished. The commune punished in such cases, he very properly adds, possessed no authority over its inhabitants such as the German theory assumed, and consequently the punishment fell upon persons who not only took no part in the acts committed but who were powerless to prevent them (p. 78). Loening asserts, however, that there was no reported instance in fact in which such a commune was fined; the German order was, therefore, only an unexecuted threat, and as matters turned out the Germans cannot be reproached.

German commanders pushed the theory of collective responsibility too far. The majority of German writers, however, have attempted to justify without exception the punitive measures resorted to by the German commanders in 1870–71. Leuder finds a justification in the embittered character which the war took on in its later stages and in the determined resistance of the French people after it had become evident that their success was hopeless,[62] and this defense is relied upon by the *Kriegsbrauch im Landkriege*, which adds that experience shows pecuniary penalties to be the most effective means of insuring the obedience of the civil population.[63] Regarding the charge that the amount of the fines levied was excessive in many instances, Leuder remarks that the promptness with which they were paid is evidence enough that they were "in truth not too exorbitant."[64] He even goes to the length of holding that communities may be fined for the continued persistence of the inhabitants in keeping up a struggle in which there is no hope of success (*durch frivol fortgesetze Kriege*).[65] The 25 franc per capita levy for breaking the resistance of the French was therefore a justifiable measure.[66]

Finally, Leuder, Loening and the *Kriegsbrauch im Landkriege* defend the policy of pecuniary penalties as applied in 1870–71 on the ground that it was successful in deterring the civil population from persisting in their resistance to the authority of the enemy — a very doubtful justification, because if the test of the legitimacy of an instrument or a measure be merely its success few instrumentalities or methods would be unlawful. Strupp likewise defends the theory of collective responsibility in its extreme form. "The whole town," he says, "is guilty of the acts of every one of its inhabitants."[67] But Bluntschli,

[62] Holtzendorff, *Handbuch des Völkerrechts*, Vol. IV, p. 508; see also sec. 112, note 14 (p. 473).

[63] Morgan, The War Book of the German General Staff, p. 178. Both Leuder and the general staff assert that the fines levied by the Germans were small in comparison with the contributions extorted by Napoleon. [64] *Ibid.*, p. 509.

[65] *Ibid.*, p. 505. See Westlake's comment on this doctrine in his Collected Papers, p. 251.

[66] *Ibid.*, p. 510. Lammasch at the First Hague Conference likewise defended the theory that money contributions may be levied for the purpose of exercising pressure upon the inhabitants to sue for peace. Ferrand, *Des Réquisitions*, p. 229.

[67] *Das Internationale Landkriegsrecht* (1914), p. 248. Compare also the fol-

very properly, it would seem, limits the right of collective punishment to communes and individuals who facilitate the commission of crimes against the authority of the occupying belligerent, or who fail to prevent them when it is possible to do so.[68] Von Liszt also remarks that it is not permissible to impose collective punishments (except by way of reprisal) for individual acts unless the totality (*gesamtheit*) of the population is responsible.[69]

Albert Zorn, another German writer, although defending in general the German measures of 1870–71 as "juristically correct and therefore unconditionally legal," nevertheless lays down the proposition that a community may not be punished for the act of an individual who injures a railway, a bridge or a telegraph line if it can prove that it has done all in its power to prevent the act.[70] Wehberg, to quote one more highly respected German authority, defends in general the principle of community responsibility, but he limits it to cases in which the inhabitants are actually responsible, even if only passively.[71]

The right of a military occupant to the unqualified obedience of the inhabitants over whom his authority has been effectively established is recognized by all writers on international law, and it is clearly affirmed by the Hague Convention respecting the laws and customs of war. The principle has also long been recognized, and it is affirmed inferentially by the above mentioned Hague Convention (Article 50), that he may hold the entire population responsible under certain con-

lowing remarks by Herr Walter Bloem in the *Kölnische Zeitung* of July 10, 1915: "The innocent must suffer with the guilty, or, if the latter cannot be discovered, the innocent must pay the penalty for the guilty, not because they have committed a crime, but to prevent the commission of crimes. The burning of a village, the execution of hostages, the decimation of the inhabitants of a commune who have taken up arms against the advancing troops, are less acts of vengeance than signs of warning to the parts of the territory not yet occupied."

[68] *Op. cit.*, sec. 643 bis.

[69] *Das Völkerrecht*, p. 340.

[70] *Das Kriegsrecht zu Land*, p. 242. Zorn, like Loening, apparently disapproves the punishment of communes other than those in which the offense was actually committed.

[71] Capture in War (English translation by Robertson), p. 48. Meurer holds substantially the same opinion. A community, he says, cannot be punished for the act of individuals unless the entire population is responsible either in an active or passive sense. *Das Kriegsrecht der Zweiter Haager Konferenz*, p. 286.

ditions for acts committed against his authority[72] by persons not belonging to the armed forces of the enemy and may punish the community by fines or otherwise for such acts. This right, however, is not unlimited. It is subject to certain well-recognized limitations and restrictions, and can not be exercised arbitrarily at the will of the commander. Article 50 of the Hague Convention declares that "no general penalty (*peine*), pecuniary or otherwise, shall be inflicted upon the population on account of acts of individuals for which they can not be regarded as jointly and severally responsible" (*solidairement responsables*).[73] Unfortunately the convention does not undertake to define the elements of responsibility, and military commanders therefore are left to judge for themselves in each specific case whether the act is or is not one for which the community could be properly held responsible. But the determination of the question of responsibility is obviously governed by certain well-established principles, one of which, it would seem, is that the community is not really responsible unless the population as a whole is a party to the offense, either actively or passively. If the act has been committed by isolated individuals in remote parts of the community without the knowledge or approval of the public authorities, or of the population, and which therefore the authorities could not have prevented, it would seem unreasonable and contrary to one of the oldest rules of the criminal law to impute guilt or responsibility to the whole population.[74] Likewise, if the authorities have

[72] There is a difference of opinion as to whether the right of punishment is limited to offenses in violation of the laws and customs of war. Bordwell (p. 316) thinks it is so limited, but Spaight (p. 408) holds otherwise and affirms that it extends to all acts forbidden by the occupying authorities, whether they are infractions of war law or not.

[73] The word *amende*, employed in the Brussels Declaration, was rejected by the Hague Conference for the term *peine*, on the ground that the use of the former term involved a confusion of ideas of the criminal law with those of international law. See Albert Zorn, *op. cit.*, p. 240, and Meurer, *op. cit.*, p. 287. The change, however, has been criticized by some writers because the word *amende*, it is said, has a clear and definite meaning in international law. Compare Pont, *Les Réquisitions*, p. 92, and Merignhac, *Les Lois et Coutumes de la Guerre sur Terre*, p. 290.

[74] Commenting on Article 50, Lawrence (Principles of International Law, p. 447) remarks that it allows inferentially pecuniary penalties upon communities when the responsibility can be brought home. "If a detachment occupying a village," he says, "were slaughtered in the night while asleep, few would argue that the com-

exercised reasonable diligence to prevent the act and if they have exerted themselves to discover and punish the actual perpertators, it hardly seems reasonable or just to say that the community is really responsible. To so hold is to insist that the public authorities are obliged to guarantee the perfect enforcement of the law, something which no community has ever in fact been able to do.

Nys remarks that collective responsibility exists only when the offense is imputable to all the inhabitants, as in the case of public injuries to the occupying force, manifestations of revolt and the like, or when the population by its attitude and will opposes an investigation.[75] Nys even contends that community fines may not be justly levied for the acts of a few isolated individuals. Such fines, he says, may be imposed only where the whole population is guilty and this guilt must be proven by the military authorities. He repudiates Loening's view that no obligation rests upon the military authorities to establish the guilt of the inhabitants, and also the doctrine of Loening, Leuder and others that the effectiveness of pecuniary punishment in preventing a repetition of the acts is a sufficient justification for the resort to collective penalties.[76] The purpose of Article 50, as Spaight

munity had no collective responsibility if a conspiracy of silence should baffle all attempts to discover the real perpetrators. On the other hand, if a train were derailed in the night while passing through a wild ravine far from human habitation, it would be wrong to hold that the population for miles around could have known of the deed and have assisted in it directly or indirectly."

[75] *Le Droit International*, Vol. III, p. 429. Compare also Brenet, *La France et Allemagne devant le Droit International pendant leurs Operations de la Guerre 1870–71*, p. 197, and Westlake (*op. cit.*, Vol. II, p. 106), who remarks that no fine is justifiable except where the responsibility can "justly be imputed to the inhabitants." Compare also Rolin's report on the subject at the First Hague Conference, where it was said: "that strictly individual acts could never be followed by collective repression in the form of a special war levy, and it becomes necessary that any repression, directed against the community, should be founded upon the more or less passive responsibility of that community. . . . The rule holds good not only in respect of fines, but for all penalties, pecuniary or otherwise, which it may be proposed to inflict upon the population as a whole."

[76] See his article on *Contributions et Réquisitions* in the *Revue de Droit Int. et de Lég. Comp.*, Vol. 38 (1906), p. 430. Compare also Merignhac (*op. cit.*, p. 282), who contends that contributions under the form of fines can be levied only on offenders and their accomplices, and that they are illegal when they fall upon innocent persons, whatever the motive for which they are levied.

remarks, was to confine collective punishment to such offenses as the community has either committed or has allowed to be committed.[77] Bonfils interprets the meaning of the article in a similar sense. A fine, he says, must be in its *quantum* proportionate to the gravity of the offense; it must bear only upon the offender and his accomplices; it is iniquitous when it falls upon the innocent who were not able to foresee the act, nor to prevent it nor to discover the offender.[78]

If, in the main, the principles thus laid down regarding the nature and limits of collective responsibility be admitted as sound, it is difficult to justify many of the impositions levied by German military commanders during the present war. Again and again they have imposed fines which would seem to be out of proportion to the gravity of the offenses alleged, and in some cases quite beyond the ability of the impoverished inhabitants to pay. It has been asserted that this was true of the levy of 60,000,000 francs on Liège (it matters little whether it was technically a contribution or a fine) — a sum which amounted to about 300 francs per capita of the population; of the levy of 50,000,000 francs on Craiova, a town of only 52,000 inhabitants; of the fine of 10,000,000 francs on Courtrai; of the 100,000 franc fine on Mons; of the fine of 3,000,000 francs on Tournai; of the fine of 3,000,000 francs on the village of Wavre; and various others. In a number of instances it must also be remembered that these impositions were in addition to other heavy exactions in the form of requisitions, contributions and tax levies. Sometimes the offenses alleged were inconsequential acts committed by isolated individuals and involving no military injury or evidence of organized hostility to the authority of the occupying forces. Some of them, indeed, were so obviously mere pretexts that the exactions imposed were, as has been said, nothing more than contributions under the guise of fines. Some writers hold, and very properly, that such impositions do not differ from pillage, except in name, and are therefore forbidden by international law.[79]

[77] *Op. cit.*, p. 408.

[78] *Op. cit.*, sec. 1218. To the same effect see also Despagnet, *op. cit.*, secs. 587–588; Feraud-Giraud, *op. cit.*, p. 17, and Bordwell, *op. cit.*, p. 317, who remarks that collective punishment is permissible only when the community could and should have prevented the act.

[79] Compare Latifi, Effects of War on Property, p. 34, and Bluntschli, *Droit Int. Cod.*, sec. 654.

In other cases the fines imposed can be justified only on a theory of collective responsibility which is rejected by the great majority of writers and which hardly seems in accord with reason or justice. Such a case was the fine of 5,000,000 francs on Brussels for the act of a police constable. The affair was one of which the population had no knowledge; they were neither active nor passive accomplices; nor was the act one which the authorities could have prevented, because they could not have foreseen it. It was an isolated individual offense and the offender was promptly arrested by the German authorities and punished by a term of imprisonment. It is difficult to understand the process of reasoning by which responsibility for an act of this kind could be imputed to the whole population. The fine was therefore nothing more than a contribution in disguise and involved no question of community responsibility.

Likewise, it is difficult to justify the second fine of 5,000,000 francs imposed on Brussels for the destruction of a Zeppelin. If the act was committed by a person belonging to the Belgian military forces, it was a lawful belligerent act for which the community was not liable to punishment; if it was done by a civilian, responsibility could not be imputed to the whole population, unless it was established that they were accomplices, which was probably not the case. In any event, the amount of the fine in both cases would seem to have been out of proportion to the gravity of the offense. The legality of the third fine of 5,000,000 francs laid on Brussels in consequence of the popular demonstration on the national holiday has been denied by the Belgian writers on the ground that a military occupant has no lawful right to repress by huge fines the manifestation by the inhabitants of their patriotic sentiments. It can hardly be contended, however, that if acts of this kind amount in fact to open manifestations of hostility toward the occupying Power, or if they are accompanied by public disorders, they may not be repressed or punished by means of fines. On the other hand, if as the Belgians allege to have been true in this case, the demonstrations were peaceable, and consisted merely of processions and the carrying of flags and that no manifestations of hostility took place, the imposition of the fine is less defensible, if it can be defended at all. Certainly, the imposition of a heavy fine on the town of Lierre for the

hoisting of the Belgian flag on a tree, if as the Belgians allege, the act was unaccompanied by manifestations of hostility or the spirit of revolt, strikes one as being a species of petty tyranny of the same kind as the act of the Federal commander who at Natchez in 1864 banished a local preacher for refusing to pray for the President of the United States.[80] The same judgment may be passed upon the act of the German commander who fined the city of Lille for the demonstrations of sympathy by some of the inhabitants for their unhappy fellow countrymen who were being escorted as prisoners through the streets. No acts of hostility were charged, no disorders appear to have been committed and no injury was done to the authority of the occupying forces.

The 500,000 franc fine levied on Brussels in consequence of the crime of murder by an unknown person in the suburb of Schaerbeek — this on the assumption that the weapon used had been procured in Brussels where the possession of firearms by the inhabitants had been forbidden by the military authorities — certainly involved a wide extension of the theory of collective responsibility. The local civil authorities had issued a proclamation urging the people to bring in their firearms and deposit them at the city hall and warning them of the severe penalties to which they were liable in case of non-compliance with the orders of the military authorities. If the civil authorities did all in their power to insure compliance with the German military regulations and also exerted themselves to discover the offender, as they claim to have done, it may be seriously doubted whether under any reasonable or just interpretation of the rule as to collective responsibility either guilt or responsibility could be imputed to the whole population. In any case, one is tempted to inquire why the responsibility for enforcing the orders of a military occupant should be placed on the civil authorities. The Hague Convention in fact imposes upon the occupying authority the duty of maintaining order; his authority in the occupied district is supreme; he has full control of the local administrative and judicial machinery; he may alter the criminal law and increase its severity in order to repress acts against his authority; he may establish special tribunals to enforce the law; and he has at his disposal his own armed forces. In view of these facts, it is a fair question to

[80] As to the facts of this case see Garner, Reconstruction in Mississippi, p. 37.

raise whether he has any legal or moral right to shift the responsibility for the enforcement of his orders to the shoulders of the civil authorities and hold them responsible for infractions which neither he nor they can prevent.

The imposition by the German officers in numerous instances of fines for the acts of unknown individuals in cutting telegraph and telephone wires, for firing upon German troops, for committing injury to bridges and lines of communications, and for other similar acts, would seem to be defensible only on the assumption that the mass of the population were accomplices, or at least approved the acts, and that the civil authorities could have prevented them had they desired to do so — an assumption which in the majority of cases was probably unwarranted.

The fine levied on Malines for the neglect of the mayor to notify the military authorities of Cardinal Mercier's journey in violation of the traffic regulations, seems to have been based on a curious interpretation of the theory of collective responsibility, and it is difficult to understand the reasoning by which the responsibility for His Eminence's conduct was imputed to the entire population. If any one, other than the Cardinal himself, was responsible, it was the mayor, and it would seem that either he or the Cardinal and they alone were the proper persons to punish.

The same thing may be said of the punishment of various towns and cities for the refusal of the municipal authorities to furnish the Germans with the names of unemployed persons and with lists of the local railway employees. It was they and not the population who refused to comply with the orders of the occupying belligerent, and it would seem that they were the proper persons to punish. The imposition of collective fines in these and other similar cases cannot be justified on any reasonable theory of community responsibility; they were in fact nothing more than contributions levied under the pretext of punitive measures and for the enrichment of the military occupant. The fining of Epernay for the inability of the civil authorities to comply with the demand of the military authorities for a quantity of salted bacon, if the assertion of the civil authorities be true, that no such supplies were available in the town, was wholly indefensible; if the facts were otherwise, the punishment was of course a justifiable measure.

Both the Belgian and French authorities charge the Germans with imposing community fines in various instances for acts which were committed, not by the civil population, but by persons belonging to the regular armed forces and which were therefore legitimate acts of war for which the community was not liable to punishment. It is impossible to establish the truth of this charge, although there is good reason for believing that the Germans, as in 1870–71, went too far in treating injuries to their communications and other similar acts when done by detached bodies of troops as the acts of *francs-tireurs* and, therefore, not permissible by the laws of war. There can be little doubt that the German *franc-tireur* doctrine has been over-exploited and too often invoked as a justification for severities against the civil population for acts which were committed by persons belonging to the regularly organized armed forces.

On the whole, the evidence regarding German practice in respect to the imposition of pecuniary penalties on the civil population of occupied districts during the present war justifies the conclusion that their policy was based on a theory of collective responsibility which is neither in accord with the well established principles of modern criminal law nor with the interpretation of Article 50 of the Hague Convention which has been given it by the great majority of recent writers on international law, including even many of those of German nationality. Unfortunately, the theory of collective responsibility, even when applied in its mildest form, necessarily involves the punishment of innocent persons, and for this reason it ought never be resorted to when other more just measures would accomplish the same end, and in no case unless an active or passive responsibility can really be imputed to the mass of the population, or where the civil authorities have failed to exercise reasonable deligence to prevent infractions or to discover and punish the actual offender in case they have been unable to prevent the offenses. Some writers hold that collective punishments ought never be resorted to except as a measure of reprisal, while others, like Bonfils and G. F. de Martens, condemn the whole theory and express the hope that it will ultimately disappear entirely from warfare.[81]

[81] Bonfils, *Droit Int., pub.* sec. 1224, and G. F. de Martens, *Traité de Droit Int.*, Vol. III, p. 265. Compare also Rouard de Card, p. 178.

As the Germans have learned, however, it is a measure which is both easy of enforcement and is generally effective in deterring the civil population from committing infractions against the authority of the occupying forces, and these circumstances have accentuated the temptation to abuse the right and to extend it to cases to which it can not be applied, except upon an interpretation which can hardly be reconciled with reason or the generally recognized principles of criminal justice. It was just because of its effectiveness that Leuder, Loening and other German writers have sought to justify the wide extension of the theory and its use on a large scale in the war of 1870–71. There is no difficulty in justifying such a policy, if one only accepts the German doctrine that the test of the legitimacy of an instrument or a measure is its effectiveness, that is, whether its employment contributes to the attainment of the object of the war.[82]

However strongly we may condemn the general policy of the Germans in respect to the imposition of collective penalties during the present war, it would be going too far to assert that the conduct of the civil population of the districts occupied by the German forces was always irreproachable. It is difficult for an American on the basis of the information now available to reach a definite conclusion as to the truth or falsity of the various charges and countercharges, but it is fair to assume that in some instances the imposition of fines was not

[82] See, for example, the *Kriegsbrauch im Landkriege* (trans. by Morgan), pp. 69, 84, 85; Leuder in Holtzendorff, Vol. IV, sec. 96; Von Hartmann, *Militärische Nothwendigkeit und Humanität* in the *Deutsche Rundschau*, Vol. XIII, pp. 119 ff. and Vol. XIV, pp. 117 ff. and von Clausewitz on War (Eng. trans. by Graham, Ch. II). See also the views of Field Marshal Prince Schwarzenberg quoted in the *Continental Times* of September 17, 1915. There is little German literature dealing with the levying of collective penalties during the present war which is yet available in America. Meurer's monograph entitled *Die völkerrechtliche Stellung der vom Fiend besetzten Gebiete* (1915) contains a brief general defense of the German policy, and Albert Zorn in his *Kriegsrecht zu Land* (1915) apparently finds nothing for which the Germans may justly be reproached. It is a little singular that the German White Book, the Belgian Peoples' War, which contains an elaborate defense of many of the charges that have been made against the Germans in Belgium, gives no attention to the subject of contributions, requisitions or fines. Likewise Stier-Somlo, in a long article dealing with international law in the territories occupied by the German forces (*Zeitschrift für Völkerrecht*, Vol. VIII (1914), pp. 581–608, ignores the Belgian charges that the Germans were guilty of a policy of wholesale spoliation under the form of contributions, requisitions, and collective fines.

unjustified, if we accept the theory of collective responsibility in any form. Nevertheless, it may be said, by way of extenuation of the conduct of the Belgians, where they were really guilty of committing offenses against the authority of the occupying forces, that the provocation under which they acted was extremely great. They were the innocent victims of an unjust invasion; they were expected to remain silent spectators while their land was ravaged and their countrymen put to death in large numbers without cause, as they believed; to all this and more they were required to submit absolutely under the severest penalties. That they should have at times overstepped the hard limits which were thus set to their conduct by a ruthless military conqueror is to have been expected. These extenuating circumstances the Germans might well have taken into account, and where real military necessity required the infliction of punishment in the form of pecuniary exactions, more regard might have been had to the impoverished condition of the inhabitants and their inability to raise exorbitant sums of money. Measures of such severity as those to which the Germans had recourse in many instances are always of doubtful expediency in the end, because instead of subserving a real military necessity they only tend to drive the population to desperation, to arouse an undying hatred against the occupying belligerent, to intensify the spirit of revenge, and finally to make it more difficult to overcome effectively the resistance of the people who are made the victims of such severities.

JAMES W. GARNER.

TREATY VIOLATION AND DEFECTIVE DRAFTING

A TREATY, by whatever technical name it may be known, is a solemn undertaking in derogation of the sovereignty of the state, which is entered into for the purpose of establishing, regulating, or destroying a juridical contract binding two or more states. It ordinarily establishes the definition of a specific jural relation actually subsisting between the contractants, who engage to accept and enforce it as positive law;[1] but not infrequently establishes new relations. Accord-

[1] A treaty is primarily a compact between independent nations, and has been briefly described as a contract between nations. 38 Cyc., 961.

A compact between states or organized communities or their representatives. United States *v.* Hunter, 21 Fed. 615, 616.

Treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization. Mr. Justice Brown in Tucker *v.* Alexandroff, 1901, 183 U. S., 424, 427, cited in Scott's Cases on International Law, 426.

As between nations it [a treaty] is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party the other may, at its option, declare it terminated. Davis, J., in Hooper, Admr. *v.* United States and other cases, 1887, 22 Court of Claims, 408, 416.

Treaties are not purely voluntary compromises; they are acknowledgments of material conditions engendered by the state of society. Those which have anticipated most have been doomed to the most humiliating failures. David Jayne Hill, History of European Diplomacy, II, 605.

Their general character must assimilate them to a real contract. They may be defined as the expressly declared agreement by two or more states to establish, modify or extend between them an obligatory relation. Despagnet, *Cours de Droit international*, sec. 444.

Hautefeuille (*Des droits et des devoirs de nations neutres*, I, 10) observes that treaties which limit themselves to appealing to the provisions of primitive laws and to determining and regulating the method of their exercise between the contracting parties are always obligatory, not only for the whole time stipulated by the parties, but for the whole period of existence of the contracting states, because they cannot modify the rules relative to the execution of the primitive laws.

A treaty is a contract between independent political societies. . . . A contract is an accepted promise. . . . An obligation is a force determining human conduct. The force exerted by the penalty attached to the breach of law, and thus by the law itself, is the thing corresponding to the phrase *legal obligation*. The force

ing to strict theory, each sovereign state is entirely at liberty to do anything it pleases, but, as in the case of the individual, the history of civilization is the history of states exercising their sovereignty to derogate therefrom so that mutual relations may be rendered more satisfactory. A treaty is, of course, valid only if contracted voluntarily; but though in the past duress has been exerted to force signing a treaty, in modern practice, ratification, an executive function, is a condition precedent to binding force, and, as a consequence, any ratified treaty may be considered as valid.

In view of the volition exercised in negotiation and the second thought provided by ratification, what is the status of the violation of a treaty? It can be defined only as an illegal phenomenon. And this is the more true because the inherent sanctity of treaties is even greater than that of the municipal law, which in many cases is repugnant to the interests of the individual citizen who is bound by it, while a treaty is always the consensus of the negotiating states. Consequently, international law has developed many tests for determining the legality of treaties. Rules of mere interpretation are not much different from those of municipal law; but we are concerned here rather with means of determining when a treaty ceases to exist. The very best method of determining this is by inserting a periodic clause in the treaty itself,

exerted by the sentiment of moral disapproval, and thus by any rule of conduct to the infraction of which it is attached, is the thing answering to the phrase *moral obligation*. But this is not precisely what we mean when we use these phrases. We do not mean the force actually exerted in either case — a force which varies infinitely. . . . We mean rather the force which the law is calculated to exert — without any conscious analysis of the notion expressed by "ought," which indeed seems to elude analysis. The obligation of a law thus denotes to us, not the actual force of the law, but a force which our minds ascribe to it; and the obligation of a moral rule denotes a force which our minds ascribe to the moral rule. The moral obligation of a contract is the duty of not disappointing the expectation which the promise is calculated to create; and the strength of the duty depends on the strength and the reasonableness of that expectation. The rules of conduct which use and opinion are sure to beget by degrees among civilized communities in constant and various association with each other have acquired not only the name but somewhat of the strength of laws; they perform for nations, though imperfectly, the precious service which laws perform for private men, that of furnishing fixed positive standards for conduct and for the adjustment of disputes. Mountague Bernard, Four Lectures on Subjects connected with Diplomacy, 164–169.

stating that the document shall remain in force for a stipulated period from the date of exchange of ratifications. Such a clause is found in nine-tenths of the treaties — practically all nonpolitical treaties — negotiated in recent years and operates automatically to bring the documents up for review. Earlier treaties, however, did not contain this provision, and it is not considered desirable in treaties of neutralization; or necessary in other acts where execution of the contract is accomplished once for all, such as a cession of territory, or in conventions that are declarative of accepted law, such as the Hague engagements.

This study is to be mainly historical as to the violation of treaties in the strict sense, and it is, therefore, important to get bearings at the outset. A treaty is not violated by a difference of agreement as to its meaning; it can only be violated when the parties accept the same meaning and the sense thereof is contravened. A treaty can be violated by extinguishing it without proper reason, and this is the most customary method that history divulges. State A delcares that for it a treaty does not exist or bind, and the failure on the part of B to accept this point of view will constitute violation by A. But, as extinction of treaties is a normal phenomenon, it is necessary to show the methods by which this can be accomplished. For the purpose of making the requisite distinctions, I have taken four lists, compiled respectively by Wharton, Bluntschli, Laghi, and Bonfils-Fauchille,[2] of

[2] Wharton, International Law Digest, 2, 58, cited Moore, Digest of International Law, 5, 319; Bluntschli, *Das moderne Völkerrecht*, secs. 411, 412, 414, 450 ff.; Laghi *Theoria dei trattati internazionali*, 198 ff.; Henry Bonfils (mise au courant par Paul Fauchille), *Manuel de Droit international public*, 855–860.

It should be stated that nothing new has been added to the framework of law relative to the extinction of treaties since Samuel Puffendorf wrote Book III of *Juris naturae et gentium libri VIII* in 1672, and he was much indebted to Grotius. Almost all authors of treatises refer to the subject, many as fully as those here cited.

For a study of extinction see Olivi, Luigi, *Sull' Estinzione dei Trattati internazionali*, in *Annuario delle Scienze giuridiche, sociali e politiche, diretto da Carlo F. Ferraris*. Anno 4, 1883, 1–67. Olivi reviews the opinions of publicists very thoroughly and concludes *inter alia:*

"Therefore, with few exceptions, we can say that our science was and is unanimous in protesting against the violation of international pacts, and that just as it has recognized the freedom of states to bind themselves by valid agreements, so it has denied to them an unlimited freedom of choice in considering them extinct at their pleasure, taking merely material interests as the only rule for such behavior" (p. 11).

the methods by which treaties attain the end of their life. Each is written from a somewhat different point of view, and they repeat each other to a very small extent, even when discussing the same general cause of the extinction of a treaty.

Wharton considers the circumstances under which treaties may be modified or abrogated, and his attitude evidently is that, with these circumstances present, the document is practically automatically altered or extinguished. Bluntschli considered both voidability and extinction. Laghi takes up primarily the treaty which in its nature is impossible. Bonfils-Fauchille lists "the causes which bring about the extinction of conventional obligations." If we were confined to a single plan, the last one would be chosen for this study, but all the lists have been combined and supplemented. The methods, then, by which a treaty comes to an end are as follows:

1. The full and complete execution of the treaty (Bonfils-Fauchille [A]) which occurs (*a*) when all material stipulations have been performed, or (*b*) when the acts accomplished are done once for all (Wharton, 4), and do not set up permanent conditions (Dalloz, *Répertoire*, 42, Part I, 561, sec. 167; Puffendorf, I, XVI, 1).

2. The expiration of the conventional term (Bonfils-Fauchille [B]; Dalloz, sec. 167, 2; Bluntschli, 450, c; Puffendorf, I, XVI, 7).

3. The attainment of a cancellative condition expressly provided for (Bonfils-Fauchille [C]; Dalloz, sec. 167, 2), which from another point of view may be stated as the ceasing to exist of a state of things which was the basis of the treaty and one of its tacit conditions (Wharton, 7; Hall, 293, 5; Bluntschli, 450, b).

4. Impossibility of execution. Wharton considers abrogation proper in the case of moral or physical impossibility; Bonfils-Fauchille definitely excludes physical impossibility from consideration (*cf.* Hall, 293, 4). The following theoretical cases of impossible treaties, chiefly from Laghi's list, may be instanced:

"In harmony with the argument previously maintained, we dub as unacceptable the theory of Del Bon, which makes the subsistence or extinction of a treaty of commerce depend on the mere utility of a contracting state" (p. 30).

"Different criteria according to the various kinds of treaties cannot be adduced, but it is necessary to fix in some way a single criterion for all cases" (p. 31).

(*a*) Those which are juridically impossible; where execution in regard to one contractant would specifically violate the document in respect to another contracting State.[3] Such a situation might now arise if two Powers were given conflicting rights in the same territory, particularly if the subject of the treaty were ordered therein to take action to satisfy both.

(*b*) Those which fail to recognize or offend the principle of nationality (Hall, 293, 6).

(*c*) Those which establish cessions, donations, changes, separations, unions, or federations of people without the consent of those interested.

(*d*) Those which contract for the assistance of foreign troops against their own subjects, or for intervention or protection when the people protected are deprived of their inherent liberties.

(*e*) Those which sanction conquest, the abdication of sovereignty, the subjection of one people to another; phrased by Bluntschli as those which "aim at the forcible suppression of a peaceful and virile state" (sec. 412, b).

(*f*) Those which impose on a state a given form of government, a dynasty, a limit to its free political, economic, or intellectual development.

(*g*) Those which deal with affairs of states not parties to the treaty, or contradict valid and nonextinct treaties with other parties of earlier date (in so far as they contravene the other treaties) (Hall, 275).

(*h*) Those which deal with things common to all, as seas, or deny any right to foreigners, or prescribe religious persecution.

(*i*) Those which contract dishonest loans or offend the general laws of humanity and the necessary principles of the law of nations.

(*j*) Those which recognize slavery, piracy, brigandage, etc.

(*k*) Those which prevent a state from excluding foreigners from its territory in the public interest.[4]

[3] Vattel (III, VI, 93) poses the proposition in considering three allied states, of which two are at war against each other and are calling on the third for assistance.

[4] An arbitrary expulsion may nevertheless give rise to a diplomatic claim. Moore,

5. The renunciation by a state of the rights which a treaty confers upon it (Bonfils-Fauchille [E]); otherwise stated as the election to withdraw of a party having the option (Wharton, 5; Hall, 293, 2; Dalloz, sec. 167, 3; Puffendorf, I, XVI, 3).

6. Mutual consent to bring the agreement to an end (Wharton, 1; Hall, 293, 1). This seems a better phrasing of the idea than the "mutual dissent" of Bonfils-Fauchille [F], which is explained as the "concurrence of the wills which sufficed to create rights and obligations between states." (Puffendorf, I, XVI, 4.) Bluntschli defines it as extinction "through a free agreement" (sec. 452).

7. Denunciation under conditions provided in the treaty itself (Bonfils-Fauchille [G]; Hall, 293, 3).

8. When continuance is conditioned upon terms which no longer exist (Wharton, 2; Dalloz, sec. 167, 5), provided annihilation has not been occasioned by the fault of the parties, by the decease of the person interested or obliged, if no one else legally succeeds (Heffter sec. 99; Puffendorf, I, XVI, 6).

9. Unilateral denunciation [5] (Bonfils-Fauchille [H]), in accordance with the maxim *conventio omnis intelligitur rebus sic stantibus* (Wharton).

10. The refusal by either party to perform a material stipulation (Wharton, 3; Bonfils-Fauchille [I]).

11. Extinction, temporary at least, by war of treaties, incapable of execution during hostilities (Bonfils-Fauchille [J]). In case of war only those treaties necessarily affected by the conditions are suspended

Digest of International Law, IV, 67–96. Allegations of treaty violation as a result of expulsion have been nulled by the United States in connection with incidents based on Art. 1 of the treaty of December 18, 1832, with Russia (*ibid.*, pp. 70–80, 111–129); Art. XIII of the treaty of June 13, 1839, with Ecuador (*ibid.*, p. 74); Art. 14 of the treaty of April 5, 1831, with Mexico (*ibid.* pp. 75–76); Art. 6 of the treaty of November 3, 1864, with Haiti (*ibid.*, pp. 89–92), though in this case (Loewi's) arbitrary circumstances complicated the question; Art. XII of the treaty of March 3, 1849, with Guatemala (*ibid.*, pp. 102–108).

[5] Despagnet amplifies this and considers it legitimate (*a*) when observation of the treaty has become compromising for the political or economic existence of a country; (*b*) when the circumstances which were the motive for the treaty have changed and divest the clear purpose of the agreement of its reason for being. "But the condition of maintenance of treaties *rebus sic stantibus* must be in good faith and must not be extended to accidental modifications."

(see Wilson, Handbook, 209–212, 252). Lawrence, synthesizing Hall, analyzes the effect of war on treaties as follows (sec. 166–168):

(1) Multipartite treaties;

A. Great international treaties;

(*a*) Unaffected when war is unconnected with them.

(*b*) Unaffected as regards other stipulations and neutral signatories when the war does not arise out of the treaty but prevents performance of some provisions by belligerents.

(*c*) Effect doubtful, but dependent chiefly on will of neutral signatories, when the war arises out of the treaty.

B. Ordinary international treaties. Affected according to subject-matter, but generally suspended or abrogated with regard to belligerents and unaffected with regard to third parties.

(2) Bipartite treaties between belligerents.

A. "Transitory pacts" fulfilled by one act or series of acts and which produce a permanent effect are unaffected. (*Cf.* treaties of cession, delimitation, boundaries, etc., Bonfils-Fauchille and Lawrence; see Wilson, Handbook, 211.)

B. Treaties of alliance (Lawrence), peace, amity, commerce, etc. (Wilson, 252), are abrogated or come to an end.

C. Treaties for regulating ordinary social and commercial intercourse, such as postal and commercial treaties, conventions about property, etc., are doubtful as to the effect of war. If the treaty of peace does not deal with them, it is best to take them as merely suspended during war.

D. Treaties regulating the conduct of the signatories as belligerents, or as belligerent and neutral, are brought into operation by war.

12. The disappearance of the state by dismemberment; loss of part of a state's territory or the erection of new sovereignties on the

old territory, in which case treaties with a local application are naturally enforceable on the new sovereign.

13. Violation, by which is understood wilful disregard of treaty engagements, itself frequently in these days encouraged by conflict with municipal law or governmental policy.

Imperfect as this analysis doubtless is, one can readily see that a clear distinction must be drawn between the extinction of a treaty and its actual violation. Of the thirteen methods of extinguishing treaties listed above, Nos. 1, 2, 3, 5, 6, 7, 11, and 12 are normal processes of elimination, except that No. 11, extinction by war, is derived from an abnormal status and creates customarily only a temporary conventional death. No. 4, impossibility of execution, involves an antijural condition which is quite as much prohibition to negotiate on the lines indicated therein as it is a justification for extinguishing the agreement. No. 9, unilateral denunciation, is an abrupt, though not an illegal, method of extinguishing a treaty, as is familiar in the American action in thus abrogating the Treaty of 1832 with Russia. No. 8, in which continued existence is dependent upon conditions which no longer exist, by equity should clearly entitle the complaining party to relief, and, duly proved, should palliate an antecedent violation. No. 10, involving a refusal to perform a conventional stipulation, will serve to extinguish through subsequent negotiation; the method by definition contemplating the refusal as made dogmatically, anterior to adverse action. These explanations indicate, therefore, that out of thirteen methods of treaty extinction, at least eight are normal, and four will virtually accomplish violent extinction without the opprobrium attaching to actual violation. As Vattel says, "he who does not observe a treaty is assuredly perfidious, since he violates faith"; but he who takes proper measures to absolve himself from his promise for the future preserves his faith.

Historically, treaties were originally of little consequence if they were inconvenient, and yet the most elaborate methods were used to maintain them. The Greeks made use of the oath and religious ceremonies to render treaties binding, and there were other formalities, such as inscribing legends of faithfulness on money, exchanges of letters between the contractants, official declarations, and the *panegyreis*

which from a festival assembly eventually took on political attributes on occasion. The Fecial College of Rome had charge of treaties and, though the Greeks apparently were scrupulous about observing international engagements and for that reason made them for a term only, the Romans were exceedingly practical about such things. For instance, they set up a temple to the gods of the Assyrians, and if they wanted to avoid obligations toward a nation they put statues of that nation's gods in this temple, where in the theology of the day they became prisoners of the gods of Nineveh. Whereupon the Romans felt free from their vengeance and considered themselves at liberty to commit what evil deeds they liked. Theologically, the gods of the wronged nation had deserted it; and a nation without divine protection is beyond the pale. Romans always worked technicalities to their own advantage, and the violation of the sponsion of the Caudine Forks is both famous and typical. The Consuls T. Veturius Calvinus and Spurius Postumus were caught with the Roman army in the defile of that name without hope of escape. They made an onerous sponsion with the Samnite enemy, this being distinguished from a treaty (*foedus*) by its being signed without the fecial ceremonies consecrated by custom. The Samnite general accepted the word of the consuls and the chief officers, taking 600 hostages, depriving the army of its weapons and passing it under the yoke. The Senate refused to receive the consuls and thereafter considered itself free from the obligations imposed. The makers of the sponsion were delivered up to the Samnite leader, who refrained from revenging himself on the hostages. Historians unite in condemning the Roman practice, but it is well to realize that the engagement had only been signed, not ratified, even though under the circumstances the Roman honor most decidedly was bound. Grotius [6] thinks that Rome was not bound, and Puffendorf [7] believes that, as the sponsion was circumstantially fair, it should have had more consideration.

Reverting from the prenatal days of international law to the period of its conception, we find the Middle Ages cluttered up with a complicated treaty machinery. There were personal [8] and state treaties;

[6] *De Jure belli ac pacis*, II, XV, 16. [7] *Juris naturae et gentium*, VIII, IX, 12.

[8] The last personal treaty that has come to the writer's attention is one be-

treaties between equals and unequals; alliances and simple treaties; conventions transitory and treaties perpetual, the "transitory" pacts setting up a permanent regime and the perpetual dealing with recurring situations. More types could be mentioned, but the significant thing is that different rules applied to different types. The oath was the sanction of the period, supposedly with all the ecclesiastical force of the Roman Church behind it. "History shows," says Calvo,[9] " that, even in the time when it was customary, the oath did not always have a strictly obligatory and ineffaceable force, since frequently Catholic princes were absolved by popes from engagements to which it was applied. This notably occurred to Ferdinand of Aragon with Pope Julius II; to Francis I with Leo X and Clement VII; to Henry II with the apostolic legate Caraffa (Paul IV)" as to the truce of Vaucelles (1556). The kings of the Middle Ages were thus able to go around inconvenient treaties by an appeal to, or arrangement with, the highest ecclesiastical authorities. Pope John XXII declared the joint oath of the Emperor Louis of Bavaria and Frederick of Austria null when the former freed him. Philip, duke of Bourgogne, was absolved from an alliance with the English by Pope Eugenius IV and the Council of Basel (1431), and the same pope absolved Ladislas VI of Poland from his oath. The Peace of Westphalia displeased Pope Innocent X, who published a bull in which "from his certain knowledge and full ecclesiastical power" he declared certain articles " null, vain, invalid, unjust, condemned, reproved, frivolous, without force and effect, which no one is bound to observe in any respect even though they are fortified by oath. . . . And nevertheless, as a still greater precaution and so far as necessary, from similar movements, knowledge, deliberations and plenitude of power, we condemn, reprove, dissolve, annul, and deprive of all force and effect the said articles and all other provisions prejudicial to the above."[10]

tween Queen Victoria and the King of Prussia for the marriage of the Princess Royal with Prince Frederick William Nicholas Charles of Prussia, signed at London, Dec. 18, 1857 (Parl. Papers, 1857–58, LX, 1).

[9] Charles Calvo, *Le Droit international*, ed. of 1870, I, 719–720.

[10] Père Bougeant, *Histoire du traité de Westphalie*, VI, 413, 414. The oath is to be found in most old treaties. Compare those of Cambrai (1529), Art. 46; of Cateau Cambrésis (1559), Art. 124; of the Peace of the Pyrenees (1659), Art. 124; the

The oath itself consequently required bolstering up. The reinsurance consisted of another oath,[11] taken as to a clause incorporated in a treaty, that no attempt would be made at securing absolution from the main treaty; and then that no attempt would be made to circumvent the engagement through a third party.[12] The lapse of all such sanctions seems to have been due to inefficacy.

It is the period since the Peace of Westphalia in 1648 that really concerns the student of treaty violation. And for his purpose that period may be subdivided into the two centuries from 1648 to 1848, at which time democracy as distinguished from monarchy can be said to have established itself; and from 1848 on to the present. The first division saw an ever widening struggle against a political system inherited from the older regime based on the Roman theory of world domination. The second division, in which its thesis is still incompletely

Treaty of Ryswick (1697), Art. 38. The most modern example is in the alliance of 1777 between France and Switzerland, the oath being confirmed in the Cathedral of Soleure.

The oath was, of course, dependent for its efficacy upon the predominance of the Roman Church. So long as the Holy See was able to maintain a position for itself above all sovereigns, its influence was extensive in foreign relations between them. Pope Boniface "excommunicated Philip of France; absolved all his subjects from their allegiance to him; threatened them with curses if they obeyed him; declared him incapable of command; annulled all treaties which he might have made with princes." Robert Ward, Enquiry into the Foundation and History of the Law of Nations in Europe, II, 62.

"Another considerable advantage derived to sovereigns from the Pope's power appears in the manner in which the observation of treaties during these times was enforced. As the obedience of men gave the most effectual support to the decrees of the pontiff, it became common with them, when they entered into engagements, to subject themselves to the penalties of an interdict in case of failure, by which the power of the prince was blasted in its vigor; and could the frailty of mankind have insured a proper use of this prerogative, it would have continued one of the most powerful guaranties for the preservation of good faith that has ever been devised." Ward, *ibid.*, II, 32.

[11] An instance is the Treaty of Vincennes of 1371 between Charles V of France and Robert Stuart, King of Scotland, in which it was agreed that "the pope would discharge the Scots from all oaths they had taken in swearing the truce with the English, and that he would promise never to discharge the French and the Scotch from the oaths they had made in swearing the new treaty."

[12] Phillimore, Commentaries upon International Law, II, 81, lists the methods as oaths, hostages, pledges, guaranties, offering persons as sureties, and choosing third parties as guardians.

functioning, has seen an increasing struggle against a political system revolving around the person of the monarch, or a state ego. To the residuum of the past in any given present may usually be traced the provocation of treaty violation, though the technique of treaties is so imperfect that it has frequently been more satisfactory to lose the engagement as a corpse than to possess it as a living entity. "The reiterated confirmations of the Treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European states was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution.[13]

The current problems of international politics have been based in large part on the Treaty of Vienna of 1815 which, after the Napoleonic period of European political earthquakes, offered an opportunity for the larger development of the thesis of nationality athwart the Westphalian influence of sovereignty in the state. As the earlier "Constitution of Europe" served, along with many elements of stability, to maintain a system of minor states and principalities in the face of a growing instinct of nationality, so the principles of legitimacy and balance of power underlying the Treaty of Vienna persisted in dominating Europe, until the one has been offset by democracy and the other has come into sharp contact with the controlling thesis of internationality, resulting from modern methods of life and demands on the world in which we live. These larger conflicts have made for instability in the course of time, and can and should be avoided by the simple resort to periodicity in the fundamental treaties, thus throwing the documents up for normal review at stated intervals. In all lesser treaties this is a confirmed practice.

In the days dominated by the Westphalian thesis, kings negotiated for their states in a personal capacity; nowadays the state is not the king, but the people, and it is no paradox that national morals are consistently higher than the individual's. The popular state's word needs no oath to back it. The same history applies to other methods of

[13] Wheaton, Elements of International Law, Part III, cap. II, 11. The confirmations were due to an attempt to live up to the joint guaranty included in the treaty.

treaty sanction, the pledge, the hypothecation, the hostage, and the caution, which latter involved introducing a third party to look after fulfilment of the engagement. In fact, one of the very earliest of representative assemblies, the States General, on March 16, 1726 (O.S.), in response to a memoir of the Marquis de Saint Philippe, the Spanish Ambassador, passed this resolution: "From the observation and execution of treaties depends all the surety princes and states possess in regard to each other; and conventions to be made cannot be counted on if those which are made are not maintained." [14] In the present, due attention to drafting and the all-important fact that a treaty represents the free consensus of the negotiating minds renders it absolutely inexcusable in law or morals that a treaty should be violated.

Violation of a treaty may be viewed from various standpoints. As a matter of morals, a distinction between deliberate and unintentional, or uncontemplated, violation may be made; in which regard it may be said that deliberate infraction is now a rare phenomenon. As to character, violation may involve infraction of a part or a whole of the contract, the Grotian dictum here applying, that the articles of a treaty are conditions the lack of which renders it null. Violation may be express or implied, by which it is desired to distinguish between a definite or an indefinite conflict of the contract with action adverse to it. And violation may be internal or external as to the violating state.

Infraction of a whole treaty is almost impossible in modern times, for such engagements are invariably complex, and violation will customarily apply to a specific clause or article. Violation of a portion of a treaty will raise a definite cause of dispute, and in modern practice redress can usually be had through arbitration or claim proceedings. Not counting 127 general treaties of arbitration providing, among others, for reference of disputes relative to the "interpretation or application of treaties," there were 145 treaties in force in 1913 containing an arbitral clause relating to their content. As all of these treaties are bipartite at least, it can be seen that they practically exclude the temptation of infraction in the case of their contractants.[15]

[14] Cited in Vattel, *Le Droit des gens*, II, XV, 221.

[15] The figures are taken from Lange, *l'Arbitrage obligatoire entre nations en 1913*. It is interesting to note that this provision is of long standing, fitfully employed

These clauses apply to the bulk of the treaties in force, estimated to number 10,000. Of some 650 treaties of the United States, practically all are covered by this method. The provision is, however, generally excluded from political treaties.

Until Germany frankly advertised her violation of Belgium's and Luxemburg's neutrality conventions and Chancellor Bethmann-Hollweg brought forward the "scrap of paper" theory of international conduct, violation of treaties could almost be said always to have occurred by implication. A disposition to overlook an obscure provision that stood in the way, or to perform an act and leave it to the injured party to call attention to the violation involved, are subterfuges, even if intentional, that naturally would appeal to states at once jealous of their good name and mindful of world opinion.

Viewed from the state's coign of vantage, violation may be internal or external. Internal violation occurs when the state passes a law or commits an act within its borders contrary to a treaty. Turkey's recent abrogation of capitulatory privileges is an illustration that will constitute violation, if it can be maintained.[16] No better example of external violation can be had than Germany's disregard of Belgium's neutralization.

As to the effect of treaty violation, Woolsey (sec. 112) says:

> Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. It is not every petty failure or delay to fulfill a treaty which can authorize the other party to regard it as broken, — above all, if the intention to observe it remains. When a treaty is violated by one party in one or more of its articles, the other can regard it as broken and demand redress, or can still require its observance.

until within recent years. The Treaty of Westphalia of 1648 provides for it in Art. 17, sec. 5; the Treaty of Oliva of May 3, 1660, in Art. 35, sec. 2; the treaty of 1756 between Denmark and Genoa; the treaty of 1843 between France and Ecuador; and the Treaty of Paris of 1856 in Art. 8.

[16] Capitulatory provisions are (or were) in force with the Ottoman Empire as follows: France, 1604; England (Great Britain), 1675; Russia, 1783; Austria (Hungary), 1784; Two Sicilies (Italy), 1740; Spain, 1732; the Netherlands, 1680; Prussia (Germany), 1790; United States, 1830. Parenthesized names indicate territorial changes. Austria-Hungary and Italy are under contract with the Sublime Porte to support any attempt to abolish capitulations by negotiation.

Dalloz [17] asserts that violation by one of the contractants evidently carries the right for the other to break it likewise, and Mr. Justice Blatchford, citing 1 Kent's Commentaries, 174, said:

> Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture.[18]

Article 35 of the treaty between New Granada (Colombia) and the United States of December 12, 1846, of peace, amity, commerce, and navigation reads in part:

> 4. If any one or more of the citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, and the harmony and good correspondence between the nations shall not be interrupted thereby; each party engaging in no way to protect the offender, or sanction such violation.
>
> 5. If, unfortunately, any of the articles contained in this treaty should be violated or infringed in any way whatever, it is expressly stipulated that neither of the two contracting parties shall ordain or authorize any acts of reprisal, nor shall declare war against the other on complaints of injuries or damages, until the said party considering itself offended shall have laid before the other a statement of such injuries or damages, verified by competent proofs, demanding justice and satisfaction, and the same shall have been denied, in violation of the laws and of international right.
>
> 6. Any special or remarkable advantages that one or the other power may enjoy, from the foregoing stipulation, are and ought to be always understood in virtue and as in compensation of the obligations they have just contracted, and which have been specified in the first number of this article.

Provisions in force of identic tenor are in the treaties on the same subjects with Brazil, of December 12, 1828 (Article 33, 2, 3); with Morocco of September 16, 1836 (Article XXIV); with Bolivia of May 13, 1858 (Article 36, 2, 3). The treaty with Mexico of April 5, 1831, contained a similar set of provisions, but this portion of the treaty was

[17] *Répertoire*, 42, part 1, 561, sec. 169. In the same general connection see also Rudolph von Jhering, *Der Zweck im Recht*, I, 474–500.

[18] *In re* Thomas, 12 Blatch, 370, cited in Scott's Cases on International Law, 441; Terlinden *v.* Ames, 184 U. S. 270.

terminated by notice on November 30, 1881; as also that with Peru-Bolivia of November 30, 1836 (Article XXX, 2, 3), terminated by the dissolution of the Peru-Bolivian Confederation in 1839; and that with Peru of July 26, 1851 (Article XI, 2, 3), terminated by notice on December 9, 1863.

It may be set down as a general rule regarding the effect of violation, that it shall always have a minimum effect. For breach of contract is necessarily against public order and the burden of proof is against it. So that three dicta may be propounded:

1. The breach of the principal articles involves that of accessory ones, only if these cannot stand alone.

2. Breach of accessory articles does not involve or justify breach of articles from which they depend. For instance, the principal articles of a treaty stipulate that a boundary shall be determined by states A and B. The boundary is determined. An accessory article provides that it shall be marked by stone posts throughout. A erects iron posts, which violation will not change the effect of the other boundary articles.

3. The violation of a treaty does not annul other subsisting treaties providing they are not simple accessories of the broken contract.

Reverting to instances of violation [19] it is the intention to cite cases in accordance with the distinctions set forth above, but it seems advis-

[19] Instances of vigorous treaties only have been examined. It may be useful to submit tests to determine them. F. de Martens, in his *Traité de Droit international* (I, 515) lays down certain fundamental conditions which must underlie a treaty. He divides these into: (1) subjective conditions, as to the persons who conclude the acts; and (2) objective conditions, as to the objects of the treaties. The subjective conditions are: (1) The concluding states must be fully independent, semi-sovereign states not having the legal capacity to sign treaties (*Staatsarchiv*, XXIX, No. 5482); (2) negotiators must have full powers to engage a state and observe the customary forms of this state; (3) the necessity of sanctioning or ratifying, ratifications indicating the formal acceptance by the sovereign authority of a treaty concluded by duly authorized plenipotentiaries; (4) free will of the contracting parties, error, fraud and constraint rendering an international agreement without effect; (5) reciprocity of declarations, it being necessary that every proposition made by one of the parties be accepted by the other. (In this connection the learned Russian cites an instance in which Sweden's declaration of peace of Nov. 7, 1772, supposed the existence of the corresponding declaration of Denmark, which in reality did not occur until two days later, Nov. 9, 1772.) His objective conditions are: (1) [p. 531] material and moral possibility to execute; (2) obligation only

able to reach a more objective point of view than has been developed. The scheme of arrangement chosen, which may be defined as violation according to kind, is:

1. Defective drafting, inducing more or less honest adverse action.
2. Bad faith in contracting.
3. Nonexecution or disregard.
4. Violation by hostile legislation.
5. Deliberate violation.

Historical instances will be cited under the conditions and after application of the tests already set forth.

I. Defective Drafting

In treaties, above all other public documents, accuracy of language is essential to insure freedom from dispute. A treaty must mean exactly what it says, and it is in large measure due to the readiness with which fine distinctions of meaning may be expressed in French that that language has become the diplomatic tongue, in which all multipartite international treaties or conventions are officially signed and ratified. National translations are valid only as they are good translations, however official they may be. Bipartite treaties are ordinarily signed and ratified in two originals, one language of which is frequently indicated as controlling in case of dispute. It might be supposed that this variation of language would result in numerous difficulties, but it does not; and when it does, the difficulty is ordinarily one of interpretation which a little negotiation serves to dispel. And this is true notwithstanding the rather interesting fact that some official translations — usually all that municipal lawyers consult — are inaccurate. It is another character of linguistic lapse that gives rise to treaty breach, the failure to say what is meant, or its left-handed expression. The misuse, or careless use, of language is too frequent

upon the contracting parties; (3) the right recognized by a treaty to a certain state may not, therefore, be conceded to another state.

Pradier-Fodéré, *Traité*, 2, 716, sec. 1057, says that the four conditions of the validity of treaties, indispensable to their existence, are: capacity of the contractants; their consensus; a certain purpose forming the matter of the engagement; and a licit cause.

for it not to occur in the 100,000 and more pages of extant treaties, but it is rather surprising that it has given beginning to very few violations.

A few may be cited to illustrate how diplomats sometimes nod in their mother tongues or their adoptive tongue, French.

A. Prior to 1848

1. Toward the end of the year 1780 trouble broke out between Great Britain and the States General. Great Britain complained that the Dutch were carrying wood for the construction of vessels to her enemies. The controlling treaty of commerce of December 1, 1674, does not include building timber among the articles of contraband which the subjects of either were forbidden to carry to the enemies of the other, but the English maintained that this prohibition was included in that of aid for warlike objects, a prohibition expressed in the later treaties. France, on the other hand, demanded of the Republic that it convoy ships laden with timber cargoes for France. The English Ministry presented, on March 21, 1780, a memoir claiming warlike assistance from Holland in accordance with a separate article of the treaty of alliance of Westminster of March 3, 1678. The States General not having replied to this memoir, London declared on April 17, 1780, that the subjects of the United Provinces would henceforth be considered as those of neutral Powers not privileged by treaties. All specific provisions destined to favor the liberty of navigation and commerce of Dutch citizens as expressed in different treaties, and especially in the Treaty of Marine, concluded at London, December 1, 1674, were suspended; which naturally relieved England of the ambiguity.

2. Article IX of the Peace of Utrecht between France and Great Britain of April 11, 1713, has regard to Dunkirk, whose fortifications the French king agreed to raze and whose port he contracted to fill at his own expense within a period of five months after the peace, never to repair it. This clause was renewed in all subsequent treaties up to the Peace of Versailles of January 20, 1783, when France secured its final abolition. Louis XIV, taking advantage of the circumstance that the Treaty of Utrecht did not prohibit the right of replacing the

port of Dunkirk by another, began to develop Mardick, a village about a league from Dunkirk, where the port was deeper than the one filled up, and to which he made a canal. This bad faith, due to imperfect wording of the engagement, gave rise to complaints from England which led Louis XIV to issue an order of suspension of the works at Mardick in February, 1715.[20]

By Article IV of the Treaty of The Hague of January 4, 1717, regularizing the triple alliance of Westminster of May 25, 1716, the King of France promised to execute everything that he had promised in respect to the city of Dunkirk and to omit nothing which Great Britain believed necessary to the entire destruction of the port of Dunkirk. The article continues: "When this treaty is ratified the King of Great Britain and the Seigneurs of the States General may send commissioners to the place to be eye witnesses of the execution of this treaty."

By virtue of this clause in the triple alliance, British commissioners frequently visited Dunkirk to inspect the port, and violated the spirit of the treaty by exerting the right in time of war in 1744 and 1756. It was not until 1783 that France secured final freedom from the bothersome article. The recriminations in respect to Dunkirk continued until that time, and in 1744, among the causes of war with France, England gave French violation of the treaties forbidding the reëstablishment of fortification of Dunkirk. By the Convention of Aix la Chapelle of August 2, 1748, Article XVII, it was agreed that Dunkirk would remain fortified on the land side, as it then was, and that on the coast side the basis of the former treaties would be followed.

3. The approach of the French army of Maillebois and the movements of a Prussian corps under the Prince of Anhalt-Dessau, made George II lose hope of guaranteeing the Electorate of Hanover from invasion in 1741. He sent a minister to Paris to announce his intention of maintaining neutrality, and Louis XV sent to Hanover M. de Bussy, minister to London, who signed with Barons Munchausen and Steinberg, the ministers of George II, on October 28, 1741, the treaty

[20] Schoell, *Histoire Générale des Traités de Paix*, II, 106; Hall, *op. cit.*, 1st ed., 284; Phillimore, *op. cit.*, 2, sec. LXXIII. The treaty of Utrecht as to Dunkirk stipulates "*nec dicta munimenta, portus, moles, aut aggeres, denuo unquam reficiantur.*"

of neutrality of Hanover, in which it was forgotten to state how long the neutrality should run, a fact which gave a pretext for its speedy rupture.[21]

4. Three separate secret articles were attached to the quadruple alliance of Warsaw of January 8, 1745, between the King of Poland, the Elector of Saxony, the King of Great Britain, the Queen of Hungary and the United Provinces. "To put the Kingdom of Poland more in a state of being useful in the public cause," says the third article, "the King of England and the Queen of Hungary promise to aid the King of Poland in his salutary views to this end, *the more so* (*d'autant*) as they shall be able to do it, without violating the laws and constitutions of the said Kingdom." The King of Poland desired to assure the succession to his son, but there is an equivocation in the particle *d'autant* (*more so*), in place of which it is doubtless necessary to read *autant* (simply meaning *as much as*) or *en tant* (indicating *in so far as*). It is not evident that this mistake really led to any difficulty, but it is obviously erroneous, as pointed out by Wenck.[22]

5. Imperfect wording of Article IX of the Treaty of Åix la Chapelle, April 30, 1748 (preliminary), October 18, 1748 (definitive) gave rise to a dispute in America. This article ordered the restitution of American conquests made during the war, adding that everything should be restored "*sur le pied qu'elles etoient ou devoient être avant la guerre*" (on the basis they were or ought to be before the war). The *devoient être* (ought to be) offered the English a pretext constantly to undertake new expeditions against the French in the north, where the boundaries had never been delimited by treaty. On the other hand, the English replied to this charge that they were only repressing French attempts to extend their boundaries at the expense of their neighbors. The principal difference related to the boundaries of Arcadia or Nova Scotia, which had been ceded by Article XII of the Treaty of Utrecht, "conformably to its ancient boundaries," which, however, were unknown. Commissioners charged with solving this and other difficul-

[21] Schoell, *Histoire Générale des Traités de Paix*, II, 320–322; Garden, *ibid.*, III, 260.

[22] F. A. Wenck, *Codex juris gentium recentissimi*, 2, 471; Schoell, *op. cit.*, II, 361; Garden, *op. cit.*, III, 321–322.

ties sat at Paris from September, 1750, to 1755, when on June 8th the English, convinced that France was simply drawing out the conferences to regain her strength, resumed hostilities.

6. An instance of an ill-advised treaty provision is furnished in Article XXVI of the *Pacte de Famille* of Paris, August 15, 1761, between the branches of the House of Bourbon. By the article the two powers took the engagement reciprocally to confide to each other all alliances which they might effect in the future and to report to each other the negotiations which they might pursue, especially those affecting their common interests. Since the pact stipulated that either must come to the aid of the other in case of war, this provision had some reason; but, since the two states had many interests not in common, it was very difficult to have the engagements executed with entire good faith. Many times Spain complained that France was not abiding by the provision, while France made similar recriminations. The pact, however, was still in existence as late as 1790, when the King of Spain demanded France to make common cause with him. The French National Constituent Assembly, after examining the extent of the engagement, decreed on August 24 that the nation would fulfill the defensive and commercial obligations it had contracted. Article II of the Treaty of Paris of February 10, 1763, between France, Spain, England and Portugal, says that the contractant will religiously observe all previous treaties in all respects in which they are not abrogated by the present treaty, and will not permit any privilege, grace or indulgence contrary to those treaties, unless accorded by the present treaty. Abbé de Mably claims that this article revokes Article XXIII–XXIV of the *Pacte de Famille,* but this seems not to be case, for those articles refer to commerce, and the treaty under discussion is purely political.[23]

7. At the negotiation of Udine, before the Treaty of Campo Formio, the French demanded the application of French laws to the Belgian émigrés. This question was mingled with the reunion of Mantua to the Cisalpin Republic and the establishment of the Rhine as a boundary. September 27, 1797, Bonaparte proclaimed the reunion of Mantua to the Cisalpin Republic, leaving to the Court of Vienna the alternative between war and the renunciation of this city, which was regarded as

[23] Schoell, III, 89, 90, 107, 123.

the key of Italy. The Austrian Ministry, having decided to yield the point, relaxed its attitude also on the integrity of the Empire from the side of the Rhine and let itself be dazzled by a system of compensation, in which the prospect of being able to aggrandize itself on the Bavarian side was presented to it. Instead of deciding the third litigious question, regarding the émigrés of Belgium, it was avoided by the use of an equivocal expression which would conciliate those affected by the provision of the French law but which left to the bad faith of the French executive directory a pretext for violating the treaty of Campo Formio. This treaty was drawn up October 17, 1797, and Article IX says:

> In all the countries ceded, acquired or exchanged by the present treaty, there will be accorded to all inhabitants and property holders whatsoever the withdrawal of the sequestration placed upon their properties, effects and revenues, on account of the war which has taken place between his Imperial and Royal Majesty and the French Republic, without their being (*sans qu'ils puissent être*) disturbed in this regard in their properties or persons. Those who in the future shall desire to cease living in the said countries shall have to make the declaration thereof three months after the publication of the definitive treaty of peace; they will have the term of three years to sell their movable and immovable property, or to dispose of them according to their desire.

The Austrian plenipotentiaries believed that they had protected the émigrés by the first part of this article, but the French executive directory immediately found a method of eluding this stipulation by pretending that this article could be alleged in favor of those who at the time of signing the treaty were still living in Belgium and not in favor of the old inhabitants, that is, the émigrés. Definite charges of violating the above provision were made by Austria at the Congress of Seltz in 1798. At that time the French negotiator, in eighteen conferences from May 30th to July 5th, was studiously unaware of the condition of the émigrés, and Austria was unable to obtain redress.[24]

8. The treaty of Mequinez of March 1, 1799, and that of Laraiche of March 6, 1845, established, by intention if not specific provisions, peace between Morocco and Spain at Ceuta. The convention of August 24, 1859, mentioned the other Spanish presidios but was silent

[24] Schoell, V, 46, 48, 52, 123.

in respect to Ceuta. At that time it was thought that the tribes of its vicinage were less savage and turbulent than elsewhere and there was not the same need of adopting means of protection against them. The negotiators were deceived in this.[25] At the very moment the convention was signed the Anjera tribe committed a particularly grave act of hostility against Ceuta. They rushed the fort built at the Spanish boundary, destroyed its walls, threw the arms of Spain into the water, and massacred the sentinels. A first exchange of diplomatic notes was fruitless, and it was not until after a military campaign that Spain was able to negotiate a treaty of peace and amity at Tetuan on April 26, 1860, which assured the protection of Spanish presidios in general, and, in Article III, of Ceuta in particular. The tribal outbreak seems not to have been in violation of the specific terms of any treaty, though perhaps constructively in contravention of Article XV of that of 1799 and Article I of that of 1845.

9. According to the armistice of Alexandria of June 16, 1800, between France and the Austrian army in Italy, the latter was to occupy Tuscany. This provision was not carried over to the preliminary articles of Paris of July 28, 1800. The French General Brune profited by this fact to occupy Tuscany, although Count de Saint Julien, the French negotiator at Paris, had been promised by the Emperor that the extraordinary levies that had been made were to cease.[26]

10. Article I of the treaty for the cession of Louisiana by France to the United States of April 30, 1803, has a unique form. It reads:

> Whereas by the third Article of the Treaty concluded at St. Ildefonso the 9th Vendemiaire an 9 (1st October, 1800) between the First Consul of the French Republic and his Catholic Majesty it was agreed as follows:
>
> "His Catholic Majesty promises and engages on his part to cede to the French Republic six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the Colony or Province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the Treaties subsequently entered into between Spain and other States."
>
> And whereas in pursuance of the Treaty and particularly of the

[25] Rouard de Card, *Les Relations de l'Espagne et du Maroc*, 68–89.

[26] Schoell, V, 354.

third article the French Republic has an incontestable title to the domain and to the possession of the said Territory — The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship doth hereby cede to the said United States in the name of the French Republic forever and in full sovereignty the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty.[27]

That the wording of the last paragraph was intentional must be obvious. The fact was that when the American negotiators in Paris were discussing the matter with the French they could get no legal proof of the exact state of execution of the Treaty of San Ildefonso, but it was certain that it had not been completely executed on the part of France, which had promised to secure the recognition by the European Powers of the King of Etruria, and on the part of Spain, which had sought pretexts to avoid the return of Louisiana to France. Under these circumstances, the Americans desired a more specific definition of the boundaries of Louisiana than France was able to furnish geographically. Historical researches failed to provide the necessary facts, and the French negotiator, M. de Marbois, said affairs were too pressing to reach an agreement as to boundaries with Spain, which would probably have to consult its American authorities. Therefore it was agreed that the San Ildefonso article of cession should be incorporated bodily into the Franco-American treaty of cession. "Article I may in time give rise to difficulties," said M. de Marbois. "They are now insurmountable; but if they do not halt you, I desire that your principals should at least know that you have been informed of them." Commenting on this incident, which in reality caused no trouble, Count de Garden makes these just remarks on ambiguity in treaties:

It is important not to introduce ambiguous clauses into treaties. However, the American plenipotentiaries made no objections; and if in appearing to be resigned to these general terms from necessity they in fact found them preferable to more precise provisions, it is necessary to admit that the event justified their foresight. The coasts of

[27] Appended to the treaty also is the full text of the Treaty of San Ildefonso. See Malloy, Treaties, Conventions, etc., 506–511; Compilation of Treaties in Force, 257–262.

the Pacific were not certainly included in the cession, but the United States has long been established there.

The French negotiator in rendering a report to the first Consul (Napoleon) of the conference remarked the obscurity of this article and the inconvenience of a provision so uncertain. He got as a reply to his remark: "If the obscurity was not there, it might have been good politics to put it in." We have related this reply to have occasion to say that the article was well justified by circumstances and that political science disavows all obscure stipulations. If they are some times convenient at the time of a difficult negotiation, they may in future be the subject of the greatest embarrassment.[28]

11. On September 2–5, 1807, the British fleet bombarded Copenhagen. It will be remembered that Nelson at Copenhagen six years before, himself a subordinate, on being informed that his superior flag officer was signaling to cease firing, put the telescope to his blind eye; and, after pointing it long and hard in the proper direction, asserted that he saw nothing, and continued fighting. On September 5 General Peymann asked for an armistice to treat as to a capitulation, which was signed the 7th. Article III states that vessels and ships of all kinds, as well as all naval stores and stocks thereof, belonging to his Danish Majesty, would be placed under guard of persons designated by the British commander-in-chief. These persons were to take possession without delay of the docks and all magazines and ships at them. The Danish Prince Royal sent orders to General Peymann to destroy the fleet rather than to allow its being delivered up. The officer carrying this order was captured at the moment when he was entering Copenhagen. Partly due to this unsuccessful coup, the English translated Article III very broadly, and it was charged that they extended the words "naval stores" to cover the destruction of all dock machinery which they could not carry away. The North German newspapers were particularly bitter on this point, but the English papers on the contrary alleged that they left the Danes so large a quantity of naval stores that they were able to equip a new fleet immediately after the leaving of the English ships.[29]

[28] Garden, *op. cit.*, VIII, 75.

[29] Schoell, IX, 68–71.

B. After 1848

It would not be true to say that imperfect wording of treaties no longer serves to create violation, but it is an obsolescent form of intentional breach. States in these days struggle for stability rather than temporary diplomatic advantages. Disputes over the wording of their engagements occur, but ordinarily they are honest disputes and are settled by negotiations, court or arbitral interpretation. The controversy over the Panama Canal tolls exemption even gives an instance of settlement of such a dispute by legislative action before any possible violation; for in essence the difference was whether the treaty stipulation of equal treatment "to all nations" was intended to include or exclude the United States. Both the opinion of the President and the testimony of surviving negotiators pointed to an original intention to include the United States, and Congress accepted that view. Imperfect wording of treaties at present most frequently occurs in the relations between states of different civilizations, especially those with non-occidental languages.

12. On July 3, 1880, was signed the convention of Madrid to regulate protection in Morocco. Of this treaty

the Arabic original is alone recognized by the Moorish Government, as being that signed for the Sultan. Literally translated, this says in Article 5: "They [the foreign representatives] have no right to employ even one Moorish subject against whom there is a claim (*daâwah*)"; and further on in paragraph 4: "No protection shall be given to anyone who is under prosecution (*jarîmah*) before the sentence is given by the authorities of the country." As nearly as it can be translated, *daâwah sharâîah* (or, as it is more commonly called, *daâwah* only) means a civil case, and *jarîmah* a criminal one. In the English text of the treaty (translated from the French original) the sentence quoted above read: "They shall not be permitted to employ any subject of Morocco who is under prosecution," and, "The right of protection shall not be exercised toward persons under prosecution for an offense or crime," etc. From this the Moors argue, with a good show of right, that no one under prosecution, whether the suit be civil or criminal, can be protected by a foreign power, the fact being that they do not know the distinction between them that we do, and that according to their copy of the treaty, both civil and criminal cases prevent protection.[30]

[30] Budgett Meakin, The Moorish Empire, 228 note; Treaties, Conventions, etc., 1776–1909, 1223; Treaties in Force, 563.

13. A complementary treaty signed at Madrid, October 30, 1861, between Spain and Morocco for the regulation of difficulties arising from the convention of August 24, 1859, and the treaty of peace of April 26, 1860, provided for fixing the boundaries of Melilla, and an act for the limitation of its territory was signed at Tangier, June 26, 1862. The provisions relative to this delimitation were executed in a very imperfect and incomplete manner. One feature of the delimitation was a sort of neutral zone, in which the marabout and cemetery of Sidi Uriak were allowed to remain. Toward the close of 1893 the Spanish authorities, supposedly under Article VII of the treaty of April 26, 1860, which provides that Spain may adopt "all the measures that it shall consider opportune for the safety of these territories, and cause the erection of all fortifications and defenses that it shall believe convenient without the Moroccan authorities ever being able to put obstacles in the way," undertook to construct a fort on the territory belonging to Spain in the vicinity of the marabout of Sidi Uriak. The tribesmen alleged that the works profaned the cemetery. They addressed a claim to the governor of Melilla presidio and, not receiving prompt satisfaction, gathered the other tribes and furiously attacked the Spanish garrison, which was rather thoroughly wiped out. By the convention of March 5, 1894, signed at Marrakesh, the incident was ended by the closing of the cemetery and some exchange of money. An additional convention of February 24, 1895, signed at Madrid put the Sultan under engagements to carry out the preceding agreement.[31]

14. A case of violation in a dynastic sense is to be found in the convention between Great Britain and Portugal by which the crown of the latter is guaranteed to the lawful heir of the House of Braganza, the British Government promising never to recognize any other ruler. This treaty was signed at London, October 22, 1807, and was part of the Anglo-Portuguese alliance series, of which the others are: London, June 16, 1373; Windsor, May 9, 1386; London, January 29, 1642; Westminster, July 10, 1654; Whitehall, April 28, 1660, and June 23, 1661, and Lisbon, May 16, 1703.[32] The provision in question was

[31] Rouard de Card, *Les Relations de l'Espagne et du Maroc*, 155–165, 192–194, 201, 223, 226.

[32] It is often asserted that the treaties of the Anglo-Portuguese alliance are

confirmed by the Treaty of Rio de Janeiro in 1810, after the Braganzas had become settled in Brazil, and by the Treaty of Vienna of January 22, 1815, between the two states which provides:

> The treaty of alliance at Rio de Janeiro of the 10th February, 1810, being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship and guaranty which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowledged to be of full force and effect.

Thus the treaty provision of 1807 was revised, and when Manuel of the Braganzas was succeeded by the republic, which Great Britain recognized, the London Government found itself violating the treaty, but with the full sanction of the other sovereign, the rulers of republican Portugal. This instance of faulty wording is, of course, only an anachronism. The careful methods of modern diplomacy would instinctively dictate referring not to "the two crowns" but to the "two high contracting parties."

DENYS P. MYERS.

secret. Wheaton knew them and anybody may find them in British and Foreign State Papers, I; 412 ff.

CONFLICTS BETWEEN INTERNATIONAL LAW AND TREATIES

In protesting against the decision of the Central American Court of Justice in the recent case of Costa Rica *v.* Nicaragua, the latter government says:

> It does not, and cannot, admit the unrestricted power that the court arrogates to itself to take cognizance of all the differences that may arise between the Central American States, . . . because no nation on earth would submit to the arbitrament of strangers its security and preservation. . . .[1]

In reply the court supported its decision, which had denied the capacity of Nicaragua to conclude the Bryan-Chamorro Treaty with the United States, and said:

> It must be evident, then, that if this strange reasoning were to find support among the other governments signatory to the Treaties of Washington, then at once, and perhaps forever, would be effaced an institution that now stands as the worthiest conquest of civilization, one of which the Central American States have been justly boastful and for which they have well merited the applause and admiration of the whole world.[2]

In his editorial comment on this case in the January number of this JOURNAL, Professor Brown remarked: "The most significant point of international law raised by this whole controversy is the right of a state in its sovereign capacity to negotiate as a free agent with another sovereign state concerning matters of vital interest to other neighboring states." He concludes: "We need to recognize, in place of the archaic theory of sovereignty, the great principle, the fundamental reality of the mutual dependence, the common interests of the world." [3]

It was this need which the Central American Court recognized in upholding its jurisdiction, and which it regarded as its very *raison d'être.*

[1] This JOURNAL, Supplement, *11:* 5. [2] *Ibid.* [3] This JOURNAL, *11:* 158, 159.

In a previous article in this JOURNAL[4] the conclusion was reached, that when the state expresses its will definitely, as through a statute, courts will recognize such a source of law as superior to international law and apply the statute in case of a conflict. Statutes, however, ordinarily apply only within the territory of the state.[5] They are pronouncements of the internal sovereignty of the state. Thus, within its boundaries, judicial practice recognizes that the state enjoys *l'autonomie de la volonté*.[6] Is there a similar judicial recognition of the external sovereignty of the state? The very idea of international law seems to imply that the external activity of the state is limited by law,[7] but ordinary courts of justice, because of their limited jurisdiction, cannot often consider cases involving such activity.[8] There is, however, one type of case in which they may do so, that in which a conflict arises between the immediate will of the state as expressed in a treaty and international law.

How far has general practice recognized that the capacity of a state

[4] Conflicts of International Law with National Laws and Ordinances, this JOURNAL, *11:* 1.

[5] "'All legislation is *prima facie* territorial.' Words having universal scope such as 'every contract in restraint of trade'. . . will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator may subsequently be able to catch." Justice Holmes, in American Banana Co. *v.* United Fruit Co., 213 U. S. 347 (1909).

[6] Even here the expression of the state's will must be unequivocal. Thus less definite sources of municipal law, such as executive orders, judicial precedents, etc., will not always stand in the way of the application of international law, even in case of a clear conflict, and municipal law will always be interpreted in harmony with international law if possible. See this JOURNAL, *11:* 1.

[7] The theory of sovereignty can be saved even here by assuming that the law is formed by agreement, in which case the will of each is not limited because it forms a voluntary component of the *volonté générale*. We speak, however, of sovereignty in the legal sense which gives meaning to the phrase, "The king can do no wrong." It is very clear that the will of the "sovereign" as expressed today by king, or president, or legislature, may not be in accord with the *volonté générale* embodied in international law, even though the "sovereign" may have "agreed" to that law in the past.

[8] Judicial recourse to the doctrine of "political questions," "acts of state," and "*actes du gouvernment*," usually means that on matters relating to external sovereignty the courts have no jurisdiction and so will regard the acts of political agencies of the government as facts to be accepted, not as legal questions to be judged.

to conclude treaties is limited by customary international law and treaties which it has previously concluded with third states? The question can be answered by considering the relative legal weight given to treaties and international law. If a treaty provision in conflict with a rule of international law or an earlier treaty is held to be inoperative by a national or international court, an actual limitation has been imposed upon the power of the state to contract. Sovereignty has been compelled to bow before the law.

Conflicts of international law (1) with treaties affecting nonsignatories, (2) with treaties affecting only signatories [9] and (3) conflicts between two treaties, will be considered successively.

CONFLICTS OF INTERNATIONAL LAW WITH TREATIES AFFECTING NONSIGNATORIES

Some writers have maintained that treaties in certain cases, as, for instance, when meliorating the harshness of earlier practice,[10] form a true source of international law and are obligatory even toward nonsignatories. Wheaton said in his first edition:

> The effect of treaties and conventions between nations is not necessarily restricted, as Rutherforth has supposed, to those states who are direct parties to these compacts. They can not indeed modify the original and pre-existing international law to the disadvantage of those states who are not direct parties to the particular treaty in question. But if such a treaty relaxes the rigor of the primitive law of nations in their favor, or is merely declaratory of the pre-existing law, or furnishes a more definite rule in cases where the practice of different states has given rise to conflicting pretensions, the conventional law thus introduced is not only obligatory as between the contracting parties, but constitutes a rule, to be observed by them towards all the rest of the world.[11]

[9] By signatories is meant states which have signed and ratified the treaty and exchanged ratifications. A state which has signed but not ratified a treaty is legally in the same situation as a state which has had nothing to do with the instrument.

[10] Examples are furnished by Article 12 of the treaty between the United States and Italy of 1871 abolishing the right of capturing enemy property at sea, and prior to 1856 by the numerous treaties providing for free ships, free goods. Many provisions of the Hague Conventions, as, for instance, No. XI, 1907, Article 5, exempting the crew of captured enemy merchant ships from detention as prisoners of war, are also meliorations of customary international law.

[11] Henry Wheaton, The Elements of International Law, 1st ed., Philadelphia, 1836, p. 50. As authority, Lord Grenville's speech in the House of Lords, Nov. 13,

Wheaton omitted this paragraph from the last edition revised by himself (1848), and the statement, except in reference to treaties declaratory of international law, now receives no support. The proper rule seems to be that treaties need be observed only to the advantage of signatories, a condition expressly recognized in the Hague Conventions;[12] in a number of arbitration treaties concluded by the United States, which specifically exclude matters affecting third states from the scope of the arbitral agreement;[13] and in numerous other treaties, in terms requiring observance toward signatories alone.[14] A state by signing a treaty does not obligate itself to observe its provisions toward third states,[15] although a treaty worded in universal terms, relaxing the severity of customary international law, is apt to furnish a strong diplomatic argument against a signatory state by a nonsignatory claimant.[16]

1801 (Hansard, *36:* 232, abstracted in Wheaton, History of the Law of Nations, N. Y., 1845, p. 408 *et seq.*), is cited, in which Lord Grenville opposed ratification of the treaty of June 17, 1801 with Russia on the ground, among others, that the meliorations of international law therein provided would be required of Great Britain by nonsignatory states. Marten's *Précis du droit des Gens,* Paris, 1831, *1:* 45, sec. 7, and Klüber, *Droit des Gens,* Paris, 1831, *1:* 5, sec. 3 have been cited as of this opinion (Reddie, Inquiries in International Law, London, 1842, 157), but they appear to have been misunderstood (Ortolan, *Diplomatie de la mer,* Paris, 1856, *2:* 442; Twiss, Law of Nations, Oxford, 1861, *1:* 132), their actual view going little farther than that of Bynkershoek, that numerous treaties with a similar content furnish evidence of accepted international law. Twiss discusses the question at length, with the conclusion that a treaty relaxing a rule of international law may extend to other nations, "but this indirect result will depend not upon the force of the convention as a contract, for that only binds the parties to it, but on certain considerations of right (jus) *dehors* the treaty."

[12] Most law-making conventions have in terms limited their operation to signatories. The Declaration of Paris, for instance, says "The present declaration is and shall be obligatory only among the Powers who have or who shall have acceded to it."

[13] As an example see treaty with Great Britain, 1908, Article 1, Malloy, Treaties, p. 814.

[14] In the treaty between the United States and Russia of 1854 the contracting parties recognized the principles of free ships, free goods, and the freedom of neutral goods in enemy ships as "permanent and immutable," but only engaged "to apply these principles to the commerce and navigation of such Powers and states as shall consent to adopt them on their part as permanent and immutable." Malloy, p. 1520.

[15] Dana, note to Wheaton, p. 610; Twiss, *op. cit., 1:* 134 *et seq.*

[16] This point was discussed by Lord Grenville in the debate in the House of

It is all the more true that third states cannot be expected to observe or to acquiesce in rules acting to their disadvantage, because of treaties to which they are not signatory.[17] England was certainly under no legal obligation to observe the Armed Neutralities of 1780 and 1800, or the United States to observe the Declaration of Paris during her Civil War,[18] except in so far as these treaties were merely declaratory of customary international law.

The courts have held that the principle of enemy ships enemy goods, which was contained in a large number of treaties of the eighteenth and early nineteenth centuries, could not be applied as to property of a nonsignatory neutral in an enemy vessel.[19] By Article 19 of the treaty between Portugal and England of 1654 it was agreed that either state should restore the prizes of the other brought to its ports. Soon after the conclusion of this treaty, England being neutral, Sir Leoline Jenkins advised against the application of this provision with reference to a Portuguese vessel brought into an English port by a French privateer, on the ground that it deprived the belligerent captor, a nonsignatory, of a just right under customary international law. He said:

The law of nations as it is at this day observed, seems not to pass any obligation on your Majesty to impart your royal protection unto

Lords on the treaty with Russia of June 17, 1801, which embodied some of the principles of the second Armed Neutrality, Hansard, *36:* 18, 200, 232; Sir R. Phillimore, Commentaries upon International Law, 3d ed., London, 1879–1889, *1:*46.

[17] Phillimore, *op. cit.*, *1:* 46; Twiss, *op. cit.*, *1:* 136 *et seq.*

[18] Dana's Wheaton, pp. 456, 586, 608.

[19] The *Nereide*, 9 Cranch 388. This rule was not followed in Bolcher *v.* Darrell, Fed. Cas. 1607 (1795), the facts of which were as follows: France, being at war with Spain, a French privateer brought a Spanish prize laden with slaves to an American port. Darrell, acting as the agent of an Englishman, Savage, who held a mortgage against the Spanish slave-trader, seized and sold the slaves, contending that the mortgagee being neutral, the slaves were neutral property and hence were exempt from capture by the French privateer, although in an enemy bottom. The court, however, held that the provision of the French treaty declaring for "enemy ships enemy goods" rendered the slaves enemy and ordered their return to Bolcher, the French privateer, saying, "It is certain that the law of nations would adjudge neutral property so circumstanced to be restored to its neutral owner, but the fourteenth article of the treaty with France alters that law by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited." Here the sufferer was a neutral Englishman not party to the treaty.

one friend to the prejudice of another; this captor being *jure belli*, which is a very good title, in full and quiet possession of his prize . . . will take it for an act of partiality to have it now wrested out of his hands and given to his enemies; whereas no man's condition is to be made worse than another's in a place that is reputed of a common security upon the public faith.[20]

The advice to apply international law rather than the treaty is delivered with caution, and concludes with the remark:

But I am taught that your Majesty's treaties with foreign nations are not to be any part of our speculations or debate in the court of admiralty, but to be interpreted by your Majesty's own judgment with the advice of your most honorable Privy Council.

It is interesting to compare this case with that of the *Appam*,[21] two and a half centuries later. The facts were similar, but international law had changed. In the latter case, the United States as a neutral restored a British vessel brought in as a prize by a German crew. The court said:

The principles of international law recognized by this government, leaving the treaty aside, would not permit the ports of the United States to be thus used by belligerents. If such were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes captured by one of the belligerents might be safely brought and indefinitely kept. . . . The violation of American neutrality is the basis of jurisdiction and the admiralty courts may order restitution for a violation of such neutrality.

Germany claimed the right to sequestrate her prize in the American port under Article 19 of the treaty between the United States and Prussia of 1799.[22] This was held inapplicable, as it referred to prizes conducted by war vessels, not to unaccompanied prizes. It is questionable, however, whether if the treaty had been in point it would have been proper for the United States to apply it, for to do so would

[20] William Wynne, The Life of Sir Leoline Jenkins, London, 1724, *2:* 732. Lord Stowell supported this opinion in 1798. "Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations; for no neutral country can interfere to wrest from a belligerent prizes lawfully taken." The *Santa Cruz*, 1 C. Rob. 49 (1798). See also, Phillimore, *op. cit.*, *2:* 143.

[21] The *Appam*, March 17, 1916, this JOURNAL, *11:* 448, 453.

[22] Malloy, p. 1492, revived by treaty of 1828, Art. 12, *ibid.*, p. 1499.

have been to act in derogation of the international obligations of neutrals to the disadvantage of Germany's enemies not parties to the treaty of 1799.

Another example of the application of customary international law when conflicting with treaties affecting third parties is found in the American neutrality policy after 1793. France claimed privileges of outfitting privateers and disposing of prizes in American ports under the treaty of 1778. While the American courts at first allowed a restricted application of the treaty,[23] later a strict policy of neutrality was maintained, and upon French retaliation for alleged nonfulfilment of the treaty by the United States, it was abrogated by an act of Congress.[24]

As a final illustration of this principle may be cited the recent decision of the Central American Court of Justice in the case of Salvador *v.* Nicaragua, holding that Article 2 of the Bryan-Chamorro Treaty of 1914 between Nicaragua and the United States, granting the United States a ninety-nine year lease of a naval station on Nicaraguan territory on the Gulf of Fonseca, could not be applied as in derogation of the international rights of Salvador and Honduras to "condominium" in the gulf.[25]

The theory of a general obligation flowing from treaties appears more reasonable in reference to great "law-making" [26] conventions of which large numbers of states are signatory, but it is believed that even here it cannot be applied as a legal principle. Such conventions may be divided into three classes:[27] (1) international settlements, (2) international law-making, and (3) international coöperation.

The first class consists of the great treaties of peace, such as those of Westphalia (1648), Utrecht (1713), Vienna (1815), Paris (1856), Berlin (1878), and treaties establishing boundaries, or status, such as the various neutralization treaties. Such treaties establish and define the entities which are to be subjects of international law for an indefi-

[23] The *Amity*, Fed. Cas. 9741.

[24] Act of July 7, 1798, 1 Stat. 578. On the controversy between France and the United States, see Moore's Digest, *5:* 591, *et seq.*

[25] Decision rendered March, 1917; printed in this JOURNAL, *infra*, p. 674.

[26] This term is suggested by Oppenheim, International Law, *1:* 23, 518.

[27] This classification and terminology are used by Pitt Cobbett, Cases and Opinions on International Law, London, 1909, *1:* 10.

nite future period and might be spoken of collectively as the constitution of the family of nations. Are such treaties of general obligation? Could a nonsignatory state reopen a boundary dispute settled by such a treaty? Could a state other than Great Britain protest to the United States against tolls discriminations in the use of the Panama Canal on the basis of the Hay-Pauncefote Treaty of 1901? Could a neutralized state invoke the neutralization treaty as against aggression by a state not a party to that treaty, or would a third state have a legal ground of protest against a declaration of war upon a neutralized state? Visscher, in speaking of the Belgian neutralization treaty, says:[28] "In the case in point the violation of these treaties implies more than the rupture of a contract: it constitutes a disregard of an objective rule of international law."

There appear to be no formal decisions on such a question as this, but it is believed that while the provisions of treaties establishing a permanent condition of things may be of universal obligation, this results from the general acceptance and acquiescence in their terms by all states, not from the treaty itself. Thus, to invoke such a treaty against or in behalf of a nonsignatory state, a tacit acceptance of the conditions in question would have to be shown.

The second class of "law-making treaties" consists of such conventions as the Declaration of Paris, the Geneva and Hague Conventions, and the Declaration of London. They establish rules and principles of international law and are by analogy sometimes spoken of as codes and statutes of the world society. However, it is clear that the analogy cannot serve to attribute to such conventions a general obligation. They are usually limited in terms to the signatories, and although frequently cited in diplomatic correspondence where one or both parties are not signatories, this is done on the assumption that the article cited is merely declaratory of customary international law.[29]

[28] C. Visscher, Belgium's Case, London, 1916, p. 17.

[29] As an instance, see the correspondence between Germany and the United States in the case of the *William P. Frye*. (This JOURNAL, Special Supplements, *9:* 180, *10:* 345.) Both the Declaration of London and the Prussian-American Treaty of 1799 were frequently cited, but in a very different manner. The former, which was not ratified at all, merely as evidence of international law, and the latter as a binding obligation.

As conventional obligations they are only binding upon signatories, though by their general acceptance they are of high value in determining what the rule of customary international law is.[30]

The third class of general international conventions comprise such documents as the General Act for the Repression of the African Slave Trade, the Universal Postal Convention, the International Sanitary Convention, etc. They establish international administrative bureaus and regulations for their operation. They are in terms and by their nature effective only as between signatories.

Treaties may, as Bynkershoek insists, furnish evidence of customary international law by which nonsignatory states are bound, but the obligation flows from the customary law, not the treaty.[31] Treaties as such are of effect only within the legal order composed of the signatories, and there would certainly be grounds of protest if a state attempted to apply a treaty to the disadvantage of a party whose state was not signatory. Customary international law supersedes treaty provisions where rights of nonsignatories are involved.[32]

[30] The preamble to the Declaration of London states the purpose of the conference to have been "to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of the 18th October, 1907, relative to the establishment of an International Prize Court."

[31] Bynkershoek, *Ques. Jur. Pub.*, lib. 1, c. 10, ed. 1752, *1:* 77, cited Dana's Wheaton, sec. 15, p. 24; Phillimore, *op. cit.*, *1:* 48; Twiss, *op. cit.*, *1:* 135. See also the *Maria*, 1 C. Rob. 360; Martens, *op. cit.*, *1:* 45, sec. 7; Klüber, *op. cit.*, *1:* 5, sec. 3.

[32] The most noteworthy failures to apply this rule have been in the case of treaties giving special privileges in time of war. The operation of such a treaty by a neutral is necessarily an infraction of the rights of third parties under customary international law, for it involves a violation of the neutral's duty of impartiality. Treaties of the seventeenth and eighteenth centuries frequently permitted the levy of troops in the territory of one of the signatories when neutral. These are now all obsolete as clearly in derogation of customary international law, but levies were permitted under them in the latter part of the eighteenth century, notably by neutral German states to Great Britain in the American Revolution. (See Hall, International Law, 4th ed., pp. 601 *et seq.*) The special privileges of bringing in prizes and repairing privateers in American ports granted to France by the treaty of 1778 have already been mentioned. In a few cases the United States courts held that the prizes taken by French vessels brought into American ports could not be restored on account of contraventions of customary international law if the acts were within the treaty privileges. See the *Phoebe Ann*, 3 Dall. 319, the *Friendship*, Fed. Cas. 3291, the *Amity*, Fed. Cas. 9741. See also Moore, *5:* 591–598. These

CONFLICTS OF INTERNATIONAL LAW WITH TREATIES AFFECTING ONLY SIGNATORIES

Where only signatories are concerned, as a general principle the reverse will be true, and treaties will take precedence of customary international law. Courts have, however, sometimes applied customary international law in the case of such a conflict, on the ground that the treaty was intended to be declaratory of international law which had subsequently changed. Thus, although a number of its early treaties required the carriage of sea letters or passports by merchantmen of the signatories when neutral, on penalty of forfeiture as probable enemy vessels, the United States prize courts have not condemned such vessels if other evidence showed a genuine neutral character.[33] The advantages of customary international law have been thus applied in spite of the treaty.

Treaties have generally been interpreted so as not to conflict with customary international law. Thus a British treaty with Sweden of 1666 forbade either signatory to "lend" ships to an enemy of the other. The British captors of a Swedish vessel, *The Ringende Jacob*, sought its condemnation, on the ground that by carrying on contraband trade it had been "lent" to the enemy and hence was confiscable under the treaty. Lord Stowell interpreted the provision as meaning a putting in entire control of the enemy and hence reconciled the treaty to the then existing rule of international law which released neutral vessels carrying a small amount of contraband. The court admitted that customary international law of the time when the treaty was made had required the condemnation of vessels engaged in contraband trade, but the owners were entitled to the benefit of the relaxed prac-

privileges not only conflicted with customary international law, but with the Jay Treaty with Great Britain of 1794. A recent example of similar character is furnished by the permission of Portugal to let British troops pass across its territory in South Africa during the Boer War, in accord with Art. 11 of the treaty of June 11, 1891. (Martens, *N. R. G.* ii, *18:* 185.) This was of obvious disadvantage to the enemy of Great Britain, a nonsignatory of the treaty. For this and other examples see L. Oppenheim, International Law, 2d ed., New York, 1912, *2:* 371–372.

[33] The *Amiable Isabella*, 6 Wheat. 1, in reference to Art. 17, of the treaty with Spain, 1795, Malloy, p. 1647. *The Pizarro*, 2 Wheat. 227; the *Venus*, 27 Ct. Cl. 116 (1892).

tice of modern international law.[34] This decision is particularly strong because to the disadvantage of the government whose court rendered it, and indicates that treaties will generally be interpreted so as not to derogate from rights recognized under customary international law.

The Alaskan boundary arbitration of 1903 was a notable instance of the interpretation of a treaty in harmony with international law, especially with the principle of prescription.[35] In fact, the Canadian Commissioners dissented from the opinion of the tribunal on the ground that international law and public policy rather than the treaties had guided the majority.

CONFLICTS BETWEEN TWO TREATIES

Where the provisions of two treaties are in conflict, the proper rule would seem to require that where the signatories are the same, the later rules,[36] but where the signatories are different the earlier rules, for in that case one of the signatories of the first treaty, not having assented to its abrogation, the other signatory was not competent to abrogate it alone, by the conclusion of a conflicting treaty with a third state.[37] Such a conflict arose between Article 17 of the treaty of the

[34] The *Ringende Jacob*, 1 C. Rob. 89 (1798); Phillimore, *op. cit., 1:* 42.

[35] British and Foreign State Papers, vol. 96; Pitt Cobbett, *op. cit., 1:* 96.

[36] Cushing, Att. Gen., 6 Op. 291. There are numerous cases of treaties made specifically to supersede earlier treaties with the same party, as for example the Hay-Pauncefote Treaty concluded by the United States with Great Britain in 1901 to supersede the Clayton-Bulwer Treaty of 1850, in reference to the Panama Canal. The Hague Conventions undoubtedly have superseded numerous bilateral treaties, thus treaties requiring one signatory when neutral to furnish a limited aid to the other when belligerent by contingents of troops, passage of troops across territory, embargo of arms, or use of ports for replenishing cruisers (see Oppenheim, *op. cit., 2:* 372), undoubtedly conflict with the fifth and thirteenth Hague Conventions of 1907 which require neutrals to observe impartiality and to prevent the unneutral use of their territory by belligerents. Such a treaty as this, which is largely declaratory of customary international law, would undoubtedly take precedence of the earlier treaty, even though both parties of the latter were not signatories of the former. In so far, however, as the Hague Conventions are not merely declaratory of preëxisting law, the rule that a special treaty supersedes a general one would apply.

[37] Phillimore, *op. cit., 1:* 44; Vattel, Bk. 2, c. 12, sec. 165; c. 2, sec. 27; Dalloz, Rept. t. 42, 1st part (1861), *s. v. Traité international*, No. 152; Pradier-Fodèré,

United States with France of 1778 and Article 24 of the treaty with England of 1794. The former required the United States to admit French privateers and their prizes to American ports for purposes of repair and supplies, whereas the latter required her to forbid all belligerent privateers these privileges.[38] In the case of the *Amity*,[39] a British vessel taken prize by the French and sold in the United States, the United States court admitted the validity of the earlier French treaty, and refused jurisdiction, but it later became evident that these privileges were incompatible with the obligations of neutrality imposed by customary international law, and the French treaty was abrogated by legislative act in 1798.[40]

A conflict appears to exist between the Hay-Varilla Treaty, concluded by the United States with Panama in 1903, and the Hay-Pauncefote Treaty previously concluded with Great Britain in 1901. Article 19 of the former exempts vessels of Panama from all tolls in using the Panama Canal, while Article 3 of the latter requires equality of tolls to the vessels of all nations using the canal. Section 5 of the Panama Canal Act of August 24, 1912, recognizes the exemption of Panama vessels. Great Britain protested against the exemption given to American vessels, also contained in this section, and in the same note made mention of the Panama exemption as being also contrary to the Hay-Pauncefote Treaty, but did not insist upon it.[41] This treaty conflict

Traité de droit international public, Paris, 1885–1906, Vol. 2, sec. 1013; W. Kaufmann, *Die Rechtskraft des Internationalen Rechtes*, Stuttgart, 1899, pp. 38, 85.

[38] See treaty United States-France, 1778, Arts. 17, 19, 22; treaty United States-Great Britain, 1794 (Jay Treaty), Arts. 24, 25. It is not clear that the French treaty actually gave the wide privileges claimed for it by the French (see Moore, *5:* 591–598), nor that the British treaty was in conflict with it, if correctly interpreted. While the 24th Article of the latter categorically forbids the arming of privateers, their provisioning more than sufficient to reach the nearest home port, and the sale of prizes in neutral ports, the 25th Article, which prohibits the giving of "shelter and refuge" to privateers with prizes, makes express exception in case of obligations of prior treaties.

[39] The *Amity*, Fed. Cas. 9741 (1796). See also the *Phoebe Ann*. 3 Dall. 319; the *Friendship*, Fed. Cas. 3291.

[40] Act of July 7, 1798, 1 Stat. 578, Moore, *5:* 356.

[41] See note of Sir E. Grey, Nov. 14, 1912; reply of Mr. Knox, Secretary of State, Jan. 17, 1913 (Diplomatic History of the Panama Canal, pp. 91, 95). The whole question is discussed in L. Oppenheim, The Panama Canal Conflict, Cambridge, 1913,

does not seem to have come before the courts, and it is highly probable that, in view of the peculiar position of Panama in reference to the canal, the exemption of her vessels from tolls being one of the conditions upon which she permitted the canal to be constructed, this exemption will not be seriously questioned. The Act of June 15, 1914, repealing the exemption of American vessels from tolls, continues the Panama exemption.

The recent decision of the Central American Court of Justice in the case of Costa Rica *v.* Nicaragua [42] involves a conflict between two treaties. Costa Rica alleged that article 1 of the Bryan-Chamorro Treaty of 1914 between Nicaragua and the United States, whereby the United States obtained the exclusive right of constructing a canal across Nicaraguan territory, was in conflict with the Canas-Jerez Treaty of 1858 between Costa Rica and Nicaragua as interpreted in an arbitral award given by President Cleveland in 1888. Under this treaty, in view of the fact that the only practicable canal route in this region would include the San Juan River, which formed part of the boundary between Costa Rica and Nicaragua, Costa Rica claimed the right to be consulted on any canal project affecting her interests and to give an opinion more than "advisory" in case her "natural rights" were affected. The decision in favor of Costa Rica upheld the earlier as against the later treaty.

The principles applicable to conflicts between international law and treaties may be summarized as follows:

(1) Treaties are of legal validity only as between signatories and are superseded by customary international law in determining the rights of nonsignatories, when no statutory rule exists.

p. 48. The exemption of Colombian vessels from tolls was provided by Article 17 of the unratified treaty of 1903, by Article 1 of the unratified tripartite treaties of 1909 between Colombia, Panama, and the United States, and by Article 2 of the proposed treaty of 1914. (Charles, Treaties, pp. 223, 234.) Great Britain ultimately consented to this exemption, in view of the "entirely special and exceptional position of Colombia toward the Canal." (Mr. Bryce to Mr. Bacon, Feb. 24, 1909, Diplomatic History of the Panama Canal, Senate Doc. No. 474, 63d Cong., 2d. sess., p. 81.)

[42] Costa Rica *v.* Nicaragua, Sept. 30, 1916, this JOURNAL, *11:* 181; answer of court to protest of Nicaragua, *ibid.*, Supplement, *11:* 3; editorial comment, *ibid.*, *11:* 156.

(2) Treaties ordinarily take precedence of customary international law in determining the rights of signatories, but when derogating from rights of nonsignatories under customary international law, or from rights of signatories recognized by that law since the conclusion of the treaty, they will generally be interpreted in harmony with it.

(3) Where two treaties are in conflict, courts will generally give precedence to the earlier if the signatories are different; to the later if they are the same.

It thus appears that states do not enjoy unlimited freedom of contract, but limitations imposed by both their own prior acts and customary international law may be enforced through the action of national and international courts.

QUINCY WRIGHT.

HUGO GROTIUS, DIPLOMATIST

THE heroic siege of Leiden had been history for eight years, the world-famous university of that name was still in its infancy, when there came into the world the man who was destined to become the foremost scholar, theologian, lawyer, statesman, and diplomatist of his age, and a poet and historian by no means insignificant. Huig or Hugo de Groot, named after his grandfather, and better known by the Latinized form of the name, Grotius, was born in Delft on Easter Sunday, the 10th of April, 1583, at a time when all of Europe was overshadowed with black clouds of massacre, assassination and war. Indeed, the outlook for the future was no more bright, for the Thirty Years' War, called the last of the religious wars of Europe, was coming with the sureness of fate.

Behind the boy spread a long line of illustrious ancestors, all of whom had been actively engaged in the service of the state, his father having been many times elected Burgomaster of Delft, and having served as one of the Curators of the University of Leiden as well as Councillor of State. We are told that the name de Groot — the Great — had been given to his ancestors in recognition and appreciation of lives spent in unselfish service of the country. Yet the shade of the family tree seems to have held forth no allurements to the son, who was entitled to the protection of its branches. From his boyhood, a boyhood endowed with the precocity of genius, he labored to prepare himself for the arduous tasks which loomed ahead. Mind and body alike were subjugated to his will.

Before the boy was seven years of age he was deep in the study of Latin and Greek, and we have preserved to us verses in these languages written by the Grotius of eight years. At the age of eleven he entered the University of Leiden, then in its nineteenth year, taking part in two public debates at the age of fourteen and graduating the same year. Already the mind of Grotius had turned toward international

events, and when, in 1598, Count Justin of Nassau and Grand Pensionary Barneveld left Holland to confer with Henry IV of France regarding the contemplated French-Spanish treaty, Hugo Grotius, a lad of fifteen years, accompanied them. The remarkable feature of this visit to France, during which Grotius took the degree of Doctor of Laws at the University of Orleans, is that the boy should have been able to withstand the flattering offers of the Court of France.

Saved by his sober judgment from this alluring life, Grotius returned to Holland to practice law. Undoubtedly it was his will alone which kept him at this work, for we have positive proof in his letters that the practice was distasteful to him. It robbed him, he said, of precious time he would have spent in studying and writing. Yet, in spite of his active work as a lawyer in The Hague, this young man found time to produce, in the winter of 1604–1605, the *De Jure Praedae*, the twelfth chapter of which was published in 1609 under the title of *Mare Liberum*.

From the time he entered the practice of law until 1621 Grotius' life was closely interwoven with the history of his country. He held the office of Attorney General of Holland, Zeeland, and West Friesland and became Pensionary of Rotterdam. When the great Gomarist-Arminian controversy arose he threw himself, with Barneveld and others, on the side of the latter, though always working to enlighten the people in the distinction between a true religious controversy and theological quibbling. And when this theological controversy entered as a wedge into the political breach already there, we find Grotius defending the constitution against the incursions of Prince Maurice.

As to the result, suffice it to say that he was arrested and sentenced to perpetual imprisonment in the ancient fortress of Loevestein, with all his estates and property confiscated. On March 22, 1621, he escaped in the now famous book-chest and fled to Antwerp, thence proceeding to Paris. In this city Grotius passed the greater part of fourteen years, studying and writing upon the problems of the world of that day. It was in Paris, 1625, that the *De Jure Belli ac Pacis*, one of the greatest works of all time, first saw the darkness of those troublous years.

In the meantime the Thirty Years' War had descended upon Europe, and the armies had overrun and devastated its fields and

towns. Gustavus Adolphus had entered the contest, to defeat the great Wallenstein at Lützen, November 16, 1632, but to die upon that field. To this brave Swedish king the learning of Grotius had stood out as a star of the first magnitude, and, sometime before his death, he had given orders that, should he die before he could carry out the plan himself, Grotius should be employed in the service of Sweden. Accordingly, Oxenstiern, the High Chancellor of Sweden, and Grotius met at Frankfort-on-the-Main in May, 1634. Together they traveled to Mainz, and there the exiled Hollander was appointed Counselor to the Queen of Sweden and her Ambassador to the Court of France.

Setting out from Mainz on the 8th of January, 1635,[1] when the roads were frozen and muddy in turn, Grotius was forced to make extensive detours in order to avoid encountering parties of the enemy. His progress was, therefore, necessarily slow, and he arrived at Metz on the 25th of January, much later than he expected and suffering from a severe cold. Five days later he wrote to Oxenstiern that he hoped to be able to leave Metz in a few days, and that he was suffering more in mind than in body, because of his restless desire to be again on his journey. His departure took place on the 2d of February, and on the 7th he passed through Meaux on the way to St. Denis. Arriving at this place, where his friend, Francis de Thou, hearing of his presence, hastened to meet him, he was compelled to tarry for some time because of the delay of the French Court in appointing a day for his formal reception.[2] The cause of this delay is not altogether certain; but, judging by the questions asked by Count Brulon on February 23, as to who had sent him into France and as to the nature of Oxenstiern's powers, it is to be inferred that the Court of France hesitated to recognize an ambassador not appointed by the Queen.[3] In fact, it was not until the 28th of January, 1636, that the appointment given by Oxenstiern was ratified by the five Regents of the Kingdom in the name of young Queen Christina.[4]

Nevertheless, on Friday the 2d of March, 1635, Grotius made his public entry into Paris, attended by Marshal d'Estrées and Count

[1] Cattenburgh's *Vervolg der Historie van het leven des heeren Huig de Groot* — Bk. I, p. 10.
[2] Burigny's *Vie de Grotius*, I, pp. 217–218.
[3] *Ep.* 364, p. 132.
[4] Cattenburgh's *Vervolg*, Bk. II, pp. 60–61.

Brulon, the latter acting in the place of Marshal St. Luc, who was ill. They came in the coaches of the King and Queen to escort the Ambassador into the city, and the coaches of the Venetian, Swiss and Mantuan Ministers were also in the procession, together with those of the German Powers allied to Sweden. The princes of the blood did not send their coaches, since they were not in Paris, Gaston, Duke of Orleans, being at Angers, the Prince de Condé at Rouen, and the Count de Soissons at Senlis with the Court.[5]

On the 6th of March Grotius was conducted to the Court, sitting at Senlis, by the Duke de Mercœur, later Duke de Vendome and Cardinal, whom Grotius calls the most learned of all princes.[6] At the reception the King's guards were under arms, and the King spoke so graciously to him that Grotius began to hope that he might be successful in his mission. By all the princes and their wives the Ambassador was equally well received, and, on March 8th, he sent Queen Christina news of his entry and of his audience with the King.[7] It seems, however, that Paauw, the Ambassador of Holland to France, was somewhat embarrassed, being in doubt as to how he should treat his former countryman; but the instructions which were sent to him at his request directed him to act toward Grotius as he would toward any other minister of a Power friendly to Holland.[8]

With Richelieu the business was more serious. There were undoubtedly occasions when the Cardinal could ill afford to be overcordial, and, before he granted Grotius an interview, he desired to learn the nature of the latter's instructions regarding the treaty lately made between France and the German Princes, with which the Swedes had been dissatisfied. Following the battle of Nördlingen, in 1634, James Laefler and Philip Strect were sent by the Protestant Princes and States of the Circles and the Electoral Provinces of Franconia, Suabia, and the Rhine, to Paris to solicit the aid of France in the war against Austria. They accepted an offer by the Cardinal of 500,000 livres and 6000 foot in six weeks, the force of foot to be increased to 12,000 when France should, with the aid of the Allies, have obtained possession of Benfeld; but they failed to stipulate that France should

[5] Burigny's *Vie de Grotius*, I, pp. 221–222. [6] *Ibid.*, p. 223; *Ep.* 339, p. 851.
[7] *Ep.* 367, p. 134. [8] Burigny's *Vie de Grotius*, I, p. 222.

also continue to pay the subsidies which she had already pledged to Gustavus by the treaty renewed at Hailbron.[9] After signing the new treaty, Laefler and Strect returned to Germany; but, when a motion to ratify their act was made in the Assembly of the Allies at Worms, the High Chancellor of Sweden opposed it on the grounds that it conflicted with the previous treaty, and declared that he would send an ambassador to France to settle the matter.[10] This burden was placed upon Grotius, a burden which weighed more heavily because of the determination of the Cardinal that the results of his negotiations with the envoys of the German Princes should not be disturbed.

With this object in view, Richelieu decided to leave the first discussion of the matter to Boutillier, Superintendent of the Finances. Accordingly, Grotius met Boutillier and a colleague of the latter, Father Joseph, in the garden of the Tuileries, which he reached through the Convent of the Capuchins. Grotius not only maintained that the treaty could not be regarded as being in force till it had been ratified by Sweden, but he also declared that it could not be ratified because it would render nugatory the Treaty of Hailbron. To this Father Joseph replied that the Ministers of the German Princes had been invested with full powers to treat and that the agreement had been signed at Paris without any stipulation concerning the necessity of ratification. The Swedish Ambassador, however, answered that the High Chancellor and even the towns which approved the treaty all insisted upon the necessity of ratification.[11]

Finding that Grotius was immovable in the stand he had taken, the French Ministers became angry and threatened not only to complain to Oxenstiern of his conduct, but also to advise Louis XIII to cease to regard him as an ambassador, but all without effect. They then said that the King would consent to the Swedes having command of the forces of France in Germany, although the treaty gave this command to a Prince; and when this concession was rejected, Father Joseph left in a rage. Grotius then continued the negotiations with the calmer Superintendent, and contended that while France might give subsidies to the Germans if she chose, it was only just and fair that

[9] Burigny's *Vie de Grotius*, I, pp. 224–225.
[10] *Ibid.*, I, p. 226.
[11] *Ibid.*, I, pp. 226–227.

those promised to Sweden, and on the strength of which the latter was fighting partly for France, should also be paid.[12]

On the 28th of March Richelieu sent for Grotius. The fact that the latter immediately waited upon him [13] shows that the statement of du Maurier, that Grotius, while Ambassador from Sweden, never saw the Cardinal, is, to say the least, inaccurate. At this conference, in which the unratified treaty was the chief subject of discussion, Richelieu argued that the King had aided the Swedes enough by supplying the Germans with men and money, while Grotius maintained that Laefler and Street were not authorized to make a treaty so contrary to the interests of Sweden. Father Joseph, who was again present, stated that the King had been informed that Grotius was the one who had persuaded the High Chancellor to refuse to ratify the treaty, an accusation which Grotius denied. The Cardinal hinted that Sweden could not expect the subsidy of a million in the future, and Father Joseph, pretending that Oxenstiern only objected to the command going out of Swedish hands into those of a Prince, intimated that the King would consent to this alteration. But Grotius insisted that the Treaty of Hailbron be strictly adhered to and the deadlock continued.[14]

At this point Oxenstiern announced that he was coming to Paris to settle all difficulties in a conference. The King ordered the Hotel for Ambassadors Extraordinary at Paris to be prepared for him, and, all discussions being suspended, went to Compiégne to meet him. Grotius, however, in consequence of a special message received by a courier, joined the High Chancellor at Soissons, and accompanied him to Compiégne.[15] Oxenstiern, who had 200 men in his retinue, was met by the Count d'Alais, son of the Duke d'Angoulême, and Count Brulon in the King's coach, the Count de Soissons, who had been first designated, being absent.[16]

It was the 26th of April, 1635, that Oxenstiern arrived at Compiégne, and on the next day he had an audience with the King which lasted half an hour and at which Grotius was present. On the 29th of the

[12] Burigny's *Vie de Grotius* I, p. 229. [13] *Ep.* 380, p. 139.
[14] Burigny's *Vie de Grotius*, I, pp. 230–232.
[15] *Ep.* 393, p. 143, and *Ep.* 396, p. 144.
[16] Burigny's *Vie de Grotius*, I, pp. 232–233.

month the Cardinal returned Oxenstiern's visit, but the High Chancellor, foreseeing that a discussion of the Treaties of Paris and Hailbron would produce bad feeling, did not mention them and spoke only of the old treaty between France and Sweden. He consented that this treaty might be slightly altered, and induced Richelieu to agree that no peace or truce should be concluded with Austria without mutual consent.[17]

The next day, Monday the 30th of April, Oxenstiern left Compiégne for Paris to reside incognito with Grotius,[18] but the crowds in Paris, clamoring to see him, were so great that they could scarcely be kept out of Grotius' home. The High Chancellor remained in Paris only two or three days, visiting the Louvre, Notre Dame, and the Palais du Luxembourg, and then, after taking leave of the King, from whom he received a diamond ring worth ten or twelve thousand crowns and a miniature of the King in a box set with diamonds, and after tactfully giving Madame de Groot a present, he proceeded, accompanied part way by Grotius, to Dieppe, whence he embarked for Holland.[19]

The treaty of Compiégne gave rise to a dispute between Oxenstiern and the Duke of Weimar,[20] to whom the Marquis de Feuquiéres hinted that the High Chancellor, in making his last agreement with France, had shown no regard for the interests of Germany. Although this insinuation had little or no foundation, it is not at all unlikely that Feuquiéres made it at the instigation of the Cardinal, who desired to gain the confidence of the Duke, while depriving the Chancellor of it. Meanwhile, Richelieu was still clinging to the Treaty of Paris, and Avaugour, the French Ambassador to Sweden, was instructed to demand its ratification. The Swedish Government replied that Laefler and Strect were not sent out by Sweden, and referred the matter to Oxenstiern. Being thus thwarted in his attempts to secure the ratification of the Treaty of Paris, the French Ambassador was forced to confine his efforts to the ratification of the agreement of Compiégne.[21]

The change in the fortunes of Grotius also brought a change to the minds of the Ministers of Charenton — Faucheur, Mestrezat, and Daille — who had refused to admit him to their communion when

[17] Burigny's *Vie de Grotius*, I, pp. 234–235.
[18] *Ep.* 400, p. 146.
[19] Burigny's *Vie de Grotius*, I, pp. 235–236; *Ep.* 344, p. 853.
[20] *Ep.* 432, p. 159.
[21] Burigny's *Vie de Grotius*, I, p. 237.

he had resided in Paris as an exile from Holland. The Ambassador from Sweden to the Court of Louis XIII was, however, a different man in the eyes of the Church, and on the 2d of August, 1635, the Ministers came to ask Grotius to join their communion.[22] In so doing they expressed the hope that he looked upon their confession of faith as consistent with Christianity, since they had read his work on THE TRUTH OF THE CHRISTIAN RELIGION and approved it. On the 23d of August, Grotius, who had not yet gone to Charenton, writing to his brother, said: "I deliberate in order that I may do only what is agreeable to God, of service to the Church, and advantageous to my family." [23] But the Ministers eventually relieved his perplexities by deciding that, although they would be very glad to receive him as a citizen, they could not receive him as Ambassador from Sweden, since they disagreed with the religious doctrines adopted by that country. Grotius, therefore, resolved to worship thereafter at home, where his services were attended by Lutherans, as though he had publicly professed their religion. On December 28, 1635, he wrote to his brother, "We celebrated the festival of Christmas at home, the Duke of Würtemberg, the Count of Swartzenbourg, and several Swedish and German noblemen being there." [24] Grotius at first had as chaplain a Lutheran minister, Brandanus, who, despite instructions to the contrary, was prone to criticize both the Catholic and the Reformed Churches, so that Grotius at last, in the autumn of 1637, forbade him the use of the chapel, although keeping him in his home until the end of the following February. After that Grotius secured the services of an Arminian, Francis Dor, whose opinions in general very happily coincided with his own.[25]

In the diplomatic world important events were taking place. Soon after Oxenstiern left France, the Peace of Vervins was broken and the French and Spaniards began the long war which was not to end until the Peace of the Pyrenees in 1659. When war was declared, the King of France and the Cardinal went to Château-Thierry. Grotius arrived at the Court on the eve of Whitsuntide, 1635.[26] As the result of the

[22] *Ep.* 350, p. 854.
[23] Burigny's *Vie de Grotius*, I, p. 240; *Ep.* 354, p. 856.
[24] *Ep.* 363, p. 858.
[25] Burigny's *Vie de Grotius*, I, pp. 242–243.
[26] *Ibid.*, I, p. 243.

victories of Marshals de Brézé and de Chatillon over Prince Thomas of Savoy and of Marshal de la Force in Lorraine, the hopes and spirits of France were soaring high. Grotius, the Cardinal being at the moment indisposed, spoke to the Superintendent, Boutillier, and to the King about the payment of the subsidies, but without result. A little later he brought the matter to the attention of Richelieu, but the latter put him off until the return of Chavigny, the Secretary of Foreign Affairs, and Grotius returned to Paris.[27]

The interview with Chavigny was difficult to obtain, the latter advancing every possible excuse for delay. However, Grotius pressed him constantly, and a meeting at length took place. Chavigny insisted, in reply to Grotius' demands, that he had only promised to help Sweden as far as he could, and that he intended to keep his word. Subsequently Servien, the Secretary of War, and the Cardinal both received Grotius most politely, but, while admitting the obligation of France, pleaded that her expenses were so great that delay was inevitable. Finally, although Father Joseph promised to use his endeavors to see that the money was paid, Grotius advised Oxenstiern to write to the King himself.[28] In the meantime, Bullion promised to pay 200,000 francs, but never issued the order; and Richelieu, in September, 1635, fearful lest the High Chancellor might conclude with the Elector of Saxony a treaty detrimental to France, promised that the Marquis de St. Chaumont should be sent to Sweden with power to act with Oxenstiern in the common cause, and referred Grotius to Bullion in regard to the subsidies.[29] Bullion, who was at Ruel, promised to pay at once only 200,000 francs and to raise the amount to 500,000 as soon as the King's affairs would permit. Meanwhile, St. Chaumont, a Catholic chosen to appease the Pope, was sent to Sweden without consulting Grotius, and on November 3, 1635, the latter found Richelieu at Ruel in a very bad mood, accusing Sweden of negotiating for a separate peace. On November 5th Grotius saw the King, and on December 14th went again to Ruel,[30] where he received, through a courier sent by St. Chaumont, some letters from Oxenstiern which he suspected had been opened. Subsequently Bullion and Servien assured him that 200,000

[27] Burigny's *Vie de Grotius*, I, pp. 243–245.
[28] *Ibid.*, I, pp. 245–248.
[29] *Ibid.*, I, pp. 248–251.
[30] *Ep.* 528, p. 204.

francs had already been ordered to be paid and that the remaining 300,000, which had been promised, should be turned over without delay.[31]

In the beginning of the year 1636 the Cardinal accused Grotius of circulating reports about the deplorable condition of affairs in France. Grotius restored his composure by explaining that the circulation of the reports was due not to any act of his, but to the efforts of Paaw and Aersens and the newspapers of Brussels.[32] Moreover, the confirmation of Grotius' appointment to the ambassadorship, the confidence which Oxenstiern placed in him, and the friendship of the Prince of Orange gradually had their effect on the attitude of the French Court and of Cardinal Richelieu in particular, and in May, 1636, the change became very apparent. At that time we find the Cardinal congratulating Grotius that part of the subsidies had been paid and complimenting him and the High Chancellor upon the way in which Sweden had prospered despite the desertion of her friends and allies. Richelieu also spoke of the gain that might be derived from an alliance with England, suggesting that, with her aid, France and Sweden might obtain the restoration of the Palatinate to Prince Charles Louis, the nephew of the English King.[33] This was the last interview Grotius ever had with the great Cardinal, who did so much to strengthen France internally and externally during the reign of Louis XIII.

The ambassadors from the Protestant countries had for some time thought that it was beneath their dignity to allow a cardinal to take the upper hand of them, since it might be interpreted as an acknowledgment of the Pope's authority. Lord Scudamore, the ordinary ambassador from England, and the Earl of Leicester, Ambassador Extraordinary, were the first to raise the issue, and we find Grotius writing to the High Chancellor, "I commend those who uphold their rights, yet I do not dare to imitate them without orders."[34] Later, however, having received no instructions to the contrary, Grotius also broke off his visits to the Cardinal; and his course met with the approval of the Queen's Ministry, although it was considered somewhat as a slight by France.

[31] Burigny's *Vie de Grotius*, I, pp. 251–255.
[32] *Ibid.*, I, pp. 255–256.
[33] *Ibid.*, I, pp. 258–260.
[34] *Ep.* 598, p. 239.

That Grotius was unpopular in some quarters is not to be denied, and at this time he was disturbed by attempts to have him recalled. St. Chaumont, the Minister to Sweden, Paaw, the Dutch Ambassador at Paris, and Father Joseph, the most trusted diplomatist of Richelieu, were particularly active in this direction, and the matter proceeded so far that a request for his recall was sent to Oxenstiern. But the High Chancellor, realizing the worth of his ambassador, and the fact that his unpopularity was due to his earnest work for the Queen, refused to listen to the complaints. A public declaration by Father Joseph that the French Ministers desired his removal because he was opposing the success and welfare of France, fared no better. The High Chancellor wisely decided that Grotius should remain in Paris as ambassador, and not merely as an agent, as Grotius had himself suggested.[35]

The chief difficulty seems to have been that Grotius was too honest to be popular in the world of diplomacy of that day. The presents welcomed by other diplomatists he refused to accept; the influences that succeeded with other ambassadors he firmly repelled.[36] This incorruptible attitude he steadfastly maintained, even when he was most perplexed in regard to his finances. On September 14, 1635, he wrote to Oxenstiern that the Treasurer of Sweden had neglected to pay his salary for the last quarter, and again, on November 8th, that he had received but one quarter's salary, which was owing before his arrival in Paris, and that two others were then due. By the end of 1638 six quarters were in arrears, while by the end of May, 1639, there was due him 40,000 francs, or $8000, being two years' full salary at 20,000 francs a year. Salvius now ordered that half of this should be paid out of the subsidies from France, but the money was slow in coming in and Grotius was forced to tell Salvius that he would ask to be recalled if not paid.[37] It was at this time that Grotius was offered a pension by the French Ministry, which he promptly refused. Finally, on the 21st of January, 1640,[38] he wrote to the Queen of Sweden for permission to take his salary from the subsidies he was obtaining, and, without awaiting a reply, appropriated 16,000 thalers. This, as he

[35] Burigny's *Vie de Grotius*, I, pp. 263–266.
[36] *Ep.* 958, p. 428.
[37] Burigny's *Vie de Grotius*, I, pp. 272–273.
[38] *Ep.* 1308, p. 592.

advised Oxenstiern,[39] his necessities compelled him to do. Besides, he was only following the precedent established by his predecessors.

Meanwhile, the first effort for peace in Europe was made. In 1636 Pope Urban VIII, seeing that the success of the Swedes in the war would prejudice the Roman Catholic religion in Germany, made a move for peace and called a conference at Cologne, with Cardinal Ginetti as mediator.[40] Grotius was of the opinion that the Swedes ought not to accept the Pope's mediation or to send representatives to Cologne. In this view he had the support of Lord Scudamore,[41] the English Ambassador, who concurred with him in thinking that the Protestants would suffer in a conference over which the Pope's delegate presided. Although the other diplomatists at Paris, and particularly the French and Venetian, realizing that the conference could not take place unless Sweden was represented, urged Grotius to attend, the Swedes stood firm and the Congress at Cologne never took place. It is interesting to note that Grotius was advised by Godefroy, one of the legates of France to the conference, not to attend. This fact justifies a doubt whether Richelieu, under whose orders Godefroy acted, really desired a peace at that time.[42] It is reasonable to suppose that the Cardinal's foreign policy had not progressed to the point where he considered peace to be expedient. Sometime later the Republic of Venice, acting in conjunction with the Pope, sought to bring about a European peace. To this move the Queen of Sweden yielded her sanction, on condition that the Republic give her the honors due her as Queen and address her as "Most Serene and Most Powerful" instead of simply "Most Serene." The negotiations proceeded very satisfactorily between Grotius and Cornaro, the Venetian Minister, after they had arranged certain petty differences over their diplomatic positions and relations.[43]

In the era of which we write, questions of etiquette and precedence were deemed to be matters of the first inportance; and, early in 1637, there occurred in France a very pretty diplomatic quarrel. Paaw, the Dutch Ambassador to France, having been recalled, his place was

[39] *Ep.* 1350, p. 612; April 14, 1640.
[40] Burigny's *Vie de Grotius*, I, p. 275.
[41] *Ep.* 690, p. 284.
[42] Burigny's *Vie de Grotius*, I, p. 277.
[43] *Ibid.*, I, pp. 279–281.

taken by Oosterwyk, former ambassador of the United Provinces to Venice,[44] who, as he had been very intimate with Grotius, was desirous of renewing their friendship now that they were to be members of the diplomatic corps in the same city. He accordingly asked Grotius to send his coach to his public entry. This Grotius did, but the ambassadors ordinary and extraordinary of England also sent their coaches, and a quarrel as to precedence ensued, in which swords were drawn. There seems indeed to have been a general confusion of coaches, horses, servants, and diplomatists until Marshal de la Force, who was escorting the Dutch Ambassador, and who seems to have felt the responsibility of getting the Ministers safely back to Paris, settled the dispute by declaring that the question had been decided in the reign of Henry III in favor of the English. To this decision the Swedes submitted, and the coaches of the two ambassadors ordinary, Grotius and Lord Scudamore, were withdrawn, thus giving precedence to that of the ambassador extraordinary of England, the Earl of Leicester. The quarrel was, however, taken up by the *Gazette of France*, with which Grotius found fault because it mentioned England before Sweden. On this question a conference took place between Leicester and Grotius, in which Leicester claimed that the precedency of Sweden over England was unheard of, while Grotius answered that *his* contention found support in the proceedings of the Council of Basel (1431–1449). Leicester further insisted that England had been converted to Christianity before Sweden, to which Grotius cleverly replied that this was a very bad reason whose employment might hinder the Pagans and Mahometans from becoming Christians.[45] The affair had no serious consequences, and was dropped after the ambassadors had exhausted their stock of reasons and probably themselves. As an evidence that the quarrel never became so serious as to affect personal relations, we have the fact that Madame de Groot stood as godmother at the christening of Lord Scudamore's child in March, 1638, which was during the height of the dispute.[46]

The last years of Grotius' embassy were, with the exception of a few incidents of importance, comparatively uneventful. As has been

[44] Burigny's *Vie de Grotius*, I, pp. 281–282.
[45] *Ibid.*, I, pp. 283–285.
[46] *Ibid.*, I, p. 287; *Ep.* 919, p. 406.

remarked, Grotius had resolved not to confer with the Cardinal again, but to treat instead directly with the King. Accordingly, on the 22d of November, 1636, just after His Majesty's return from the campaign of that year, the Swedish Ambassador called to congratulate him on his success, and again on the 23d of February, 1637, came to felicitate him on his reconcilation with Gaston of France and the restoration of union and peace in the royal family.[47]

When, in August, 1637, the King went to Chantilly, Grotius went thither to suggest to the King that he send a reinforcement to the Duke of Weimar, who had crossed the Rhine and was attempting to keep the German allies of France and Sweden from joining the enemy.[48] The King promised to send the duke as many men as he could spare. Again on September 23d,[49] Grotius sought the King in order to deliver to him a letter from the Queen of Sweden and to acquaint him with the gallant stand Marshal Bannier was making against five armies in the field. Grotius added, however, that the marshal was incapable of holding out much longer without assistance and urged that prompt reinforcements would swing many towns, then wavering under the pressure of Austria, back into the Protestant column.[50] At St. Germain on October 1, 1637, Grotius renewed his solicitation of aid from Louis, presenting a letter from Christina, dated August 19, 1637, and pointing out that, if the Austrians succeeded in defeating the Swedes, they would next overpower the Duchess of Savoy, the King's sister, and invade France. To Grotius the King gave assurances that he was then sending aid, and promised more in the future.[51]

The Duke of Weimar, on the 2d of March, brilliantly opened the campaign of 1638 by a signal victory over the Austrians, capturing all their generals, including the celebrated John de Vert, whose name had become a terror to the French. The King, upon receiving this good news, immediately notified Grotius, saying that he knew of no one to whose ears it would be more welcome — for which honor Grotius thanked Louis in an audience of March 16th.[52]

[47] Burigny's *Vie de Grotius*, II, pp. 1–2; *Ep.* 688, p. 281 and *Ep.* 719, p. 303.
[48] *Ep.* 813, p. 354.
[49] *Ep.* 327, p. 363.
[50] Burigny's *Vie de Grotius*, II, pp. 3–7.
[51] *Ibid.*, II, pp. 7–8.
[52] *Ibid.*, II, pp. 8–9; *Ep.* 926, p. 410.

On the 19th of April, 1638, Grotius again besought the King for aid, and informed him that Queen Christina would assent to the proposed mediation of the Venetians if she were addressed properly, since a long truce might lead to peace. With this in view, the Queen gave her ambassador in France full power to draw up a plan of a truce in concert with the King's Ministers. Louis told Grotius that the Count de Guébriant was already on the march to join the Duke of Weimar, that he would send more troops in the near future, and that he would nominate Chavigny to confer with Grotius on the question of a truce.[53]

In the beginning of June, 1638, Grotius again saw the King at St. Germain, requesting him once more to send reinforcements and to procure the release of Marshal Horn, the Swedish commander, who had been captured in the battle of Nördlingen, by exchanging one of the enemy's generals for him. The King answered, however, that John de Vert was the only man for whom the Austrians would make the exchange and that de Vert was the prisoner of the Duke of Weimar,[54] though Chavigny informed Grotius several days later that de Vert was really the prisoner of Louis.[55]

Meanwhile, the Pope, perceiving that peace without his intervention was still very much a matter of the future, proposed a truce, and Grotius and Chavigny met on April 27, 1638, to discuss a plan for it.[56] The latter said he had learned from Schmalz, the secretary of the High Chancellor, who had just arrived from Sweden with instructions for Grotius, that the Swedes expected the same subsidies during the truce that they had received through the war and that he thought this claim unreasonable. To this Grotius answered that the truce could be maintained only by keeping large armies in the field; that this would be a great expense, and that, during the Twelve Years' Truce (1609–1621), between the Spaniards and the Dutch, the King, following the example of his father, Henry IV, gave the Dutch the same assistance he had rendered during the war. Finally it was decided that Chavigny should consult with Richelieu, and Grotius with Schmalz, and that they should confer again in the near future.[57]

[53] *Ep.* 949, p. 421; Burigny's *Vie de Grotius*, II, pp. 9–11.
[54] *Ibid.*, II, pp. 14–15. [55] *Ep.* 971, p. 435. [56] *Ep.* 950, p. 421.
[57] Burigny's *Vie de Grotius*, II, pp. 17–19.

The next meeting took place at Chavigny's house on the 1st of May, when Chavigny informed Grotius that he would lay any proposal of the Swedes before the Cardinal. Two demands were then put in writing by Grotius, first, that the subsidies should remain the same during the truce as they had been during the war, and second, that the Swedes should not only keep the part of Pomerania which they held, but that the rest should be ceded to them. These proposals Chavigny promised to submit to the Cardinal.[58]

On May 18th, Chavigny waited upon Grotius in order to resume the discussion.[59] The French Minister declared that the King could not continue the subsidies, but would give 300,000 florins a year to the Swedes during the truce. Grotius declined to consent to a diminution of the former subsidies. As to Pomerania, Chavigny argued that the King could not demand the rest of that country from the enemy, and the conference ended by Chavigny promising to communicate the King's wishes to Grotius in writing.[60]

In the meantime Schmalz, jealous of Grotius' position, had done all that was possible to hurt him. He wrote to the Court of Sweden that they could no longer refuse to recall Grotius. To this act he was moved by the flattery borne to him by Count de Feuquiéres from the Cardinal, who, realizing that France had found a tool, assured Schmalz that Paris was extremely well pleased with him and that he would solicit his stay in France. To Chavigny, Schmalz declared that Sweden had resolved to be content with much smaller subsidies, and offered to prove this by letters.[61]

Chavigny being indisposed, Desnoyers, Secretary of War, was appointed to confer with Grotius; and he informed the latter that, as regarded the truce, everything had been settled between the Cardinal and Schmalz. Grotius, before answering, insisted upon seeing Schmalz, with whom he was willing to work in the interest of Sweden. Schmalz declared that he had settled nothing, but stated that he had full powers to act independently of Grotius in every affair of the embassy and advocated the acceptance of a subsidy of 200,000 florins during the truce.[62] When Grotius doubted this statement, Schmalz be-

[58] Burigny's *Vie de Grotius*, II, pp. 19–20.
[59] *Ep.* 960, p. 428.
[60] Burigny's *Vie de Grotius*, II, pp. 20–21.
[61] *Ibid.*, II, pp. 21–22.
[62] *Ibid.*, II, pp. 22–23.

came so insolent that Grotius wrote to the High Chancellor that one or the other should have exclusive power; and he later said: "I beg your Sublimity, that, if I can be of any use to you, you would be pleased to protect me, as you have done heretofore. In all I have done I have had nothing in view but the welfare of Sweden, and it has cost me much labor to raise up, by deeds and words, a nation little known in this country. If I cannot serve usefully, I would much rather return to the state of a private man than be a burden to the Kingdom and a dishonor to myself." [63]

Surely it was no easy task that Grotius had performed for Sweden. To a sensitive nature, such as his was, and with a delicate conscience, such as he had, many moments of those years must have been torture. His association with Schmalz was in every way burdensome. This worthy took up his residence with a Swede named Crusius, whom Grotius had presented to the King in July, 1638.[64] One day the two friends appeared intoxicated at Grotius' house, and insulted Madame de Groot by fighting and using offensive language before her. This and other misconduct on the part of Schmalz Grotius forgave, in order that personal differences might not impair their ability to coöperate for the good of Sweden; and he even used his influence to calm Baron d'Erlach, attaché to the Duke of Weimar, who was enraged at Schmalz's abuse of the duke.[65] In the end Schmalz finally returned to Sweden, richer than he had left, and embraced the Catholic religion. He was soon imprisoned for his misdeeds, but had the good fortune to escape, taking refuge in Germany where he entered the service of the Emperor.[66]

An incident connected with the introduction of Crusius to Louis XIII is perhaps worth mentioning. On their return from the audience Grotius and Crusius passed through a village where a large crowd had assembled to witness the execution of some robbers. One of the mounted servants of the ambassador, in order to make the throng give way for his master's coach, struck some of the people with his whip. The alarm immediately went out that the occupants of the coach were friends of the prisoners who had come to rescue them, and in conse-

[63] Burigny's *Vie de Grotius*, II, pp. 23–24; *Ep.* 982, p. 444.
[64] *Ep.* 988, p. 447. [65] Burigny's *Vie de Grotius*, II, pp. 24–25.
[66] *Ep.* 1046, p. 472; Burigny's *Vie de Grotius*, II, pp. 25–26.

quence shots were fired at the coach, with the result that the coachman received wounds of which he died some days later. Bullets passed within a few inches of Grotius' head, but he was unharmed, and the tumult ceased when his presence became known.[67] The King, when informed of the incident, sent Counts Brulon and Berlise, the Introducors of Ambassadors, to apologize for it and to promise that the offenders would be punished when caught. Seven or eight of the inhabitants of the village where the crime was committed were arrested, tried, and convicted, but Grotius obtained a pardon for them, thus preserving to them not only their lives but also their goods, the forfeiture of which had been decreed.[68]

But to return to the truce. The negotiations, which had failed at Paris, were transferred to Hamburg to be carried on between the Count d'Avaux and Salvius, but only to meet the same fate. A truce was little desired by the French, the Swedes, or even the Imperialists, and mutually acceptable conditions could not be arranged. Plainly the time was not yet ripe for it.[69]

On October 1, 1638, Grotius had an audience with the King, at which, after congratulating Louis upon the recent birth of a son, he asked the King to send aid to the Duke of Weimar, who was about to be attacked by a vastly superior force.[70] Louis promised to strengthen the Duke's army as much as he could, but we find Grotius asking the same aid at another audience, on the 10th of November, 1638.[71] On the 4th of December he waited upon the King and Queen to felicitate them, by order of the Queen of Sweden, upon the birth of the Dauphin. Grotius excused his Queen, on this occasion, for not having sent an ambassador extraordinary, on the ground that all the first lords of the country were employed in the army or in the Ministry, so that they could not well be spared for the long journey to Paris.[72]

Toward the end of 1638 the fortress of Brisac surrendered to the Duke of Weimar, thus making Burgundy and Champaign more secure and strengthening the position of Alsace, Lorraine, and Switzerland.

[67] Burigny's *Vie de Grotius*, II, pp. 26–27; *Ep.* 988, p. 447; *Ep.* 991, p. 449.
[68] *Ibid.*, II, pp. 27–29.
[69] *Ibid.*, II, p. 26.
[70] *Ep.* 1038, p. 468.
[71] *Ep.* 1064, p. 480.
[72] Burigny's *Vie de Grotius*, II, pp. 29–32.

Grotius paid his compliments to the King and asked that the money promised to Sweden might be paid, so that Marshal Bannier should be enabled to advance more strongly, and the King assured Grotius that the money would be sent.[73] But in March, 1639, we find Grotius again before Louis, having obtained an audience only after an argument with Count Brulon.[74] It is possible that the delay of the King in sending aid to the Duke of Weimar was the result of Richelieu's influence. The great French statesman undoubtedly regarded the Duke as a dangerous factor and as a man who would bear watching. Moreover, the Cardinal had offered his niece to Weimar in marriage, and the Duke's refusal of this offer, together with his desire to keep Brisac, which Richelieu wanted, quite enraged the Cardinal. His resentment, however, was soon to be modified, for a violent fever seized the Duke at Neuenburg, and on July 10, 1639, after running a four days' course, consigned to the grave the prince whom Grotius called "the honor and the last resource of Germany."[75] At the time of his death it was thought by some that the Duke had died of poison, and that Grotius was among this number we know from a letter which he wrote to Chancellor Oxenstiern on October 10, 1639. "The more I reflect upon the death of the Duke of Weimar," said Grotius, "the more I am persuaded that he had on his body no marks of the plague, and that it was not in his house. So the rumors that he was poisoned again prevail and the suspicion falls upon the Geneva physician who was summoned to relieve his colic."[76]

With the death of Weimar, Grotius lost a trusted and trusting friend and Sweden a commander of her armies and a ruler of her towns.

As soon as the Duke's death became known, Charles Louis, Elector of Palatine and son of the unfortunate King of Bohemia, proposed to have himself recognized as head of the Weimarian army.[77] Needing funds, the Elector went to his uncle, King Charles I, of England, from whom he obtained £25,000 sterling with a promise of more if needed; and he was also advised to work in concert with France, without whose

[73] Burigny's *Vie de Grotius*, II, pp. 33–34.
[74] *Ibid.*, II, p. 34.
[75] *Ep.* 1217, p. 549; *Ep.* 1224, p. 553.
[76] Burigny's *Vie de Grotius*, II, p. 36.
[77] *Ibid.*, II, pp. 38–51.

assistance his attempt would be useless. This Charles Louis agreed to do; but he was too impatient to wait for the passport for which Belliévre, the French Ambassador in London, had written and which the Court of France, disliking his plan, was in no hurry to grant, and set out for France incognito. He was, however, too vain to keep his identity unknown, and, after embarking publicly under a salute, he landed at Boulogne, escorted by King Charles' ships, which saluted him again as he disembarked

Upon landing, the Elector started for Paris with five servants, and, after changing his name, took the road to Lyons, where the King was. His intention was to turn off into Switzerland and thus join the army, but the Cardinal, knowing his whereabouts, allowed him to proceed as far as Moulins, where he had him arrested and confined in the citadel.[78] From thence Charles Louis was taken to Vincennes, where he was not permitted to write to any one or to receive any visitors, although, after six days, he was allowed to walk in the garden and after a month his two brothers, Maurice and Edward, were allowed to see him, though only in the presence of witnesses.[79]

His imprisonment, as may be supposed, raised not a little stir in Europe. The Earl of Leicester, as English Ambassador to France, demanded his release, and the King of England wrote to the French King that he had sent his nephew into France to confer with the King, and that if the latter would not give him an audience, he ought to send him back to England.[80] These requests, however, had no effect, and Charles I applied to the Queen of Sweden to intercede for his nephew. Accordingly, Grotius was permitted to confer with the French Ministers, and he drew up a plan of compromise, by which the Elector was to declare, in writing, that he never had intended to obtain control of the Weimarian army without the consent of the Queen of Sweden, and was then to receive the freedom of Paris on his own and the Earl of Leicester's promise that he would not leave the city without the King's consent. In this affair the French Ministry had need of Grotius' services, and treated him with a deference hardly shown before. In January, 1640, Chavigny, by order of the King, assured him that the past

[78] *Ep.* 1271, p. 576.
[79] *Ep.* 1283, p. 581.
[80] *Ep.* 1291, p. 584; *Ep.* 1292, p. 585.

acts of which he had had reason to complain were the work of the deceased Father Joseph.

France was willing to agree to the terms of Grotius' compromise, but the Earl of Leicester, who had orders to demand the Elector's unconditional release, was obliged to write to the King for instructions. In the meantime the Cardinal decided that Charles Louis should follow the Court, for the reason that he might thus be more easily watched, and be less able to interfere with France's control of the Weimarian army. The Queen of Bohemia, the Elector's mother, approved of Grotius' plan, and the Queen of Sweden ordered her ambassador to request an audience of King Louis in order to present a letter from her to the same effect.[81] On February 18, 1640,[82] the audience, which an attack of gout, from which the King was said to have been suffering, had delayed, at last took place. Grotius urged that the Elector was young and impetuous, and that the best course was to forget what had occurred, since it had done no harm. His representations were, however, destined to do little good, for the Elector, pressed by Chavigny and unable to see Grotius, signed the declaration which the King desired, and was then conveyed incognito on the night of the thirteenth to the fourteenth of March, 1640, to the Earl of Leicester's house. A few months later France recognized Charles Louis as Elector and on July 25th, 1640, the King of France gave him complete freedom, subject only to the conditions he had signed, not to work against the interests of France. He accordingly set out for Holland, to remain there until the troubles with Scotland, which were to bring his uncle's head to the block, were over.

In the meantime, Grotius had been occupied with fresh negotiations for the exchange of Marshal Horn, the son-in-law of Chancellor Oxenstiern, who had been captured at Nördlingen. The famous John de Vert was at the same time a prisoner at Vincennes, but an exchange of these generals was blocked by two difficulties. In the first place, the Duke of Weimar had declared that John de Vert was his prisoner and that he had sent him into France only to be kept there at his orders; in the second place, the French Ministry were fearful lest Marshal Horn's return might be harmful to the common cause, since

[81] *Ep.* 1319, p. 597. [82] *Ep.* 1327, p. 601.

it might occasion a dangerous split in the Allied forces.[83] In an audience with the King in the beginning of November, 1639, Grotius obtained Louis' promise to present the matter to the Ministry, after he had stated that, when the Duke of Weimar died, he had decided that John de Vert and Enkefort should be exchanged for Marshal Horn.[84] The Duke of Bavaria, who also had a claim to Horn, whom he had held as a prisoner, readily gave his consent to the exchange, and, in the beginning of September, 1640, just after the taking of Arras (a propitious time to approach the King), Grotius went to St. Germain to press the matter again. Not long afterwards Chavigny informed him that the King had consented to the exchange, provided the treaty between France and Sweden should be renewed; but the exchange was not executed, and Grotius sought an audience of the King at Rheims.[85] Here Louis promised positively that de Vert should have his liberty if the Duke of Bavaria should send Marshal Horn to Landau. Grotius so advised the Bavarian Court, de Vert was conducted to Selestad, and the exchange was at last made at Strasburg.[86]

But the exchange of the two generals did not settle the question of the renewal of the French-Swedish treaty, which was soon to expire. This renewal was negotiated at Hamburg between Claude de Même, Count d'Avaux, and John Adler Salvius, Vice Chancellor of Sweden. Grotius was subordinate to the latter, but was able to render great service, since he was so well acquainted with the affairs of France that he knew how far Sweden might go in her demand for subsidies before France would turn. On the 29th of September, 1640, he wrote to the High Chancellor that he knew the Cardinal would increase the subsidies if pressed. Accordingly, when the treaty was signed at the end of June, 1641, instead of the annual subsidy of a million francs which France had promised to Sweden by the last treaty, Sweden was now to receive 1,200,000; and this, in spite of the repeated declarations of the King that the treaty could not be renewed on the former terms.[87]

Cardinal Richelieu died in the year after the renewal of the treaty, passing away on the 4th of December, 1642.[88] Undoubtedly Grotius

[83] Burigny's *Vie de Grotius*, II, pp. 51–52.
[84] *Ibid.*, II, pp. 52–53.
[85] *Ibid.*, II, pp. 53–55.
[86] *Ibid.*, II, p. 55.
[87] *Ibid.*, II, p. 56; *Ep.* 1420, p. 647.
[88] *Ibid.*, II, p. 59.

mourned little over this loss to France; the two great men were too different in temperament, character, and ideals to work together, and consequently had been at swords points ever since they were brought into contact with each other.

Louis XIII did not long survive his Prime Minister, breathing his last on the 14th of May, 1643. Anne of Austria, Regent during the minority of her son Louis XIV, informed Grotius through Chavigny, and repeated it herself, that the King's death would make no difference in the alliance between France and Sweden. Cardinal Mazarin, gaining the Queen's confidence, took up the reins of government where the grim warrior had caused Richelieu to lay them down, but Grotius refused to deal with him directly until so ordered by his Queen.[89]

In the meantime the war had spread. Denmark had seized several Swedish ships trading in the Sound, and Sweden had declared war against the King of Denmark. In an audience in the middle of April, 1644, Grotius, without instructions, laid the causes of the conflict before the French Queen, showing her the declaration of war, which he translated into Latin and caused to be printed in Paris. Sometime later these acts of Grotius were in effect approved by the Queen of Sweden when she directed him to give to the Regent just the information he had imparted.[90]

The man who brought to Grotius the letters of Queen Christina, directing him to explain the grievances of Sweden against Denmark, was the adventurer Cérisante.[91] He was the son of Duncan, Minister of Saumur, and, being a master of *belles-lettres*, had been appointed governor to the Marquis de Foix, who later made him Lieutenant-Colonel of the Regiment of Navarre. But a quarrel, at the beginning of the Regency of Anne of Austria, with the Duke of Candale, made it necessary for him to leave the kingdom, and he had retired into Sweden with the hope of gaining the favor of the Queen. In this he was not disappointed, for she gave him a commission to levy a regiment, which he never raised, and sent him into France with the titles of Colonel and Agent of Sweden.[92]

When Cérisante arrived in Paris he had orders to do nothing unless

[89] Burigny's *Vie de Grotius*, II, pp. 59–60. [90] *Ibid.*, II, pp. 60–61.
[91] *Ibid.*, II, p. 61. [92] *Ibid.*, II, p. 63; *Mémoires du Duc de Guise*, II, p. 78.

in concert with Grotius,[93] but, relying upon the feeling which continued disputes between the Swedish Ambassador and the French Ministers had generated in Sweden, he set out to work against Grotius to his own personal profit. The reader may recall that Grotius once wrote to the High Chancellor that, in view of the difficulties attached to the Swedish Embassy in Paris, it might have been wise to keep him in Paris only as an agent.[94] This suggestion was rejected, but in the course of time the false reports that were constantly sent into Sweden by his enemies in France made an impression on the Ministry. Grotius knew that this was the case, and as he had not been consulted in the appointment of Cérisante, he looked upon him as a spy sent by the Ministry to observe his conduct.[95] On November 1, 1641, he wrote to his brother, "If they threatened to recall me from my embassy I should not be sorry; there is little profit in this kind of employment. I am tired of honors; old age approaches and will soon require rest." [96] A year later he wrote again, "I love quiet and would gladly devote the remainder of my life to the service of God and posterity. IF I HAD NOT SOME HOPE OF CONTRIBUTING TO THE GENERAL PEACE, I SHOULD HAVE RETIRED BEFORE NOW."[97]

The presence of a rash, selfish adventurer lording it over him was more than Grotius could bear, and at last, his patience exhausted, he wrote to Sweden asking that the Queen recall him. His request was readily granted.[98]

Grotius now addressed himself to Baron Oxenstiern, son of the High Chancellor and Swedish Plenipotentiary at the Peace of Münster and Osnabrug, requesting advice as to where he should go and asking for safe conduct from the ambassadors of the King of Spain, the Emperor, and the Elector of Cologne. Queen Christina, in letters to the Queen of France and to Grotius, expressed her appreciation for the great services which he had rendered with fidelity and prudence.[99]

While waiting for Baron Oxenstiern's reply, Grotius asked Spi-

[93] *Ep.* 716, p. 970.

[94] *Ep.* 690, p. 284.

[95] Cérisante was later dismissed from the Queen's service because of his dishonorable acts, but not until after Grotius' departure from Paris.

[96] *Ep.* 572, p. 928.

[97] *Ep.* 620, p. 942.

[98] Burigny's *Vie de Grotius*, II, p. 64.

[99] *Ibid.*, II, pp. 64–65.

ringius, Swedish Agent in Holland, for a ship to convey him to Gottenburg, or, if he could not do that, to obtain for him a passport to go thither from Holland. He embarked at Dieppe for Holland, where he was received most kindly. With practically no opposition he was permitted to pass through the country, and the city of Amsterdam fitted out a vessel to carry him to Hamburg, where he arrived May 16, 1645, after a voyage of eight days with head winds.[100] On the next day Grotius set out for Lübeck, where he found many friends, and the end of March saw him at Wismar, where Count Wrangel, Admiral of the Swedish fleet, entertained him splendidly and sent him to Kalmar on a man-of-war.[101]

The High Chancellor was at Suderacher, about five miles from Kalmar, negotiating a peace between Sweden and Denmark. Upon receiving a letter from Grotius announcing his arrival, he sent, on the 8th of June, his coach to carry him to Suderacher, where he remained for a fortnight, honored by the Chancellor and the other ambassadors.[102] Returning then to Kalmar, Grotius proceeded at once to Stockholm, where, on the day after his arrival, the Queen received him, having come from Upsala upon hearing of his approach. Several audiences and dinners with the Queen followed, and she several times refused to grant him his dismissal, insisting that he should bring his family into Sweden and remain in her service as Councillor of State.[103]

But Grotius was resolved to leave. He asked for a passport, and, as this was delayed, decided to depart without one. However, he had only got to a seaport two miles away when a messenger from the Queen overtook him, saying that Christina wished to see him once more before he left. He accordingly returned to the Queen, who gave him 12,000 imperials and some silver plate, which she presented to him with his passport, explaining that the finishing of the plate had caused the delay in issuing the passport. On the 12th of August he embarked for Lübeck on a vessel furnished him by the Queen.[104]

[100] Burigny's *Vie de Grotius*, II, pp. 67–68; *Ep.* 1760, p. 749.
[101] *Ibid.*, II, p. 68; *Ep.* 1762, p. 749; *Ep.* 1763, p. 749.
[102] *Ibid.*, II, pp. 68–69.
[103] *Ibid.*, II, pp. 69–70. Reference to Le Clerc, L, XII.
[104] Vindie. Grot., p. 478; Burigny's *Vie de Grotius*, II, p. 70; Cattenburgh's *Vervolg van het leven van Huig de Groot*, Bk. X, p. 409.

It is uncertain what Grotius' plans were in embarking from Stockholm. Vondel, the Dutch poet, thought he intended to go to Osnabrug, where the Peace of Westphalia was in course of negotiation. Others thought he was returning to Holland, where the Republican party was growing stronger, or that he was going to Poland in the hope that the King would send him to France as ambassador. It seems highly probable that Grotius' steps were leading him to Münster and Osnabrug to interest himself in the great peace which was to end the last professedly religious war Europe has known. But after that? Perhaps, wearied of the intrigue of negotiations, he only sought a quiet retreat where he could devote the remainder of his life to his project for the union of all Christians into one tolerant body, and all nations into an harmonious civilization.

The vessel on which Grotius embarked had hardly cleared the port when it was overtaken by a terrible storm and was obliged to put in, on the 17th of August, fourteen miles from Danzig. Grotius set out in an open wagon for Lübeck and arrived at Rostock on the 26th of August, very ill. A physician, named Stochman, was summoned, who said that Grotius was suffering from fatigue and that rest would restore his health, but the next day he was worse, being very weak and in a cold sweat. Grotius, thinking that his end was near, asked for a clergyman, and John Quistorpius was called, who, in a letter to Calovius, gives us an account of the last moments of the great man.[105] It reads as follows:

> You are desirous of hearing from me how that Phoenix of Literature, Hugo Grotius, behaved in his last moments, and I shall gratify your wish. He embarked at Stockholm for Lübeck, and, after being tossed for three days by a violent storm, was shipwrecked and got to shore on the coast of Pomerania, whence he came to our town of Rostock, distant over sixty miles, in an open wagon, through wind and rain. He lodged with Balleman and sent for Stochman, the physician, who, observing that he was extremely weakened by years, by the shipwreck and the inconveniences of the journey, judged that he could not live long. The second day after the arrival of Grotius in this town, that is, on the eighteenth of August (old style), he sent for me about nine o'clock at night. I went, and found him almost in the throes of death. I said there was nothing I desired more than to have seen him in good health, that I might have the pleasure of his conversation. He replied that God had willed it thus. I told him to prepare himself for a happier

[105] Burigny's *Vie de Grotius*, II, p. 72.

life, to acknowledge that he was a sinner and to repent of his sins; and, having made mention of the Publican, who confessed that he was a sinner and asked God's mercy, he answered: "I am that Publican." I continued and told him that he must have recourse to Jesus Christ, without whom there is no salvation. He replied, "I have all my hope in Jesus Christ." I began to repeat aloud in German the prayer which begins, "Herr Jesu"; he followed me, in a very low voice with his hands clasped. When I had finished, I asked him if he had understood me. He answered, "I understand you very well." I continued to repeat to him those passages of the word of God which are usually recalled to the memory of the dying, and, asking him if he understood me, he answered, "I hear your voice well, but I understand with difficulty what you say." These were his last words. Soon after he expired, exactly at midnight.[106]

Thus died this celebrated man, on the night of August 28 or the morning of August 29, 1645,[107] at the age of sixty-two.

After the vital organs were sealed in a copper casket and buried in the Cathedral of Rostock, to the left of the choir, the embalmed body was brought to Delft and there buried in the Nieuwe Kerk, October 3, 1645, where it now rests, beside the bodies of the Princes of Orange.[108]

He had written this epitaph for himself:

"Grotius hic Hugo est, Batavum captivus et exul,
Legatus Regni, Suecia magna, tui." [109]

HAMILTON VREELAND, JR.

[106] Burigny's *Vie de Grotius*, II, pp. 73–74. See *Ep. Eccles. et Theol.*, 583, p. 828.

[107] Cattenburgh's *Vervolg van het leven van Huig de Groot*, Bk. X, p. 412. Burigny's *Vie de Grotius*, II, p. 74.

[108] Cattenburgh's *Vervolg van het leven van Huig de Groot*, Bk. X, pp. 412–415; Fruin's *Hugo de Groot en Maria van Reigersbergh, Verspreide Geschriften*, IV, p. 93, note 4.

[109] *Ep.* 536, p. 915.

AUTONOMOUS NEUTRALIZATION

THE practical application of the principle of autonomous neutralization is, in certain cases, neither so formidable nor so difficult as its name might seem to indicate. It states this doctrine: that any state may, of its own volition, declare itself permanently neutral. A state may not only engage itself to remain neutral during a particular war; but may also assume an abstract neutrality, not conditioned by the acts of any other states. Such a doctrine implies an analogy between a state and a person; namely this, that a state is given a personality, a free will, and a body of rights and obligations.

From the time when states first become distinguishable amid the shifting flux of primeval society, they have experienced a steady accretion of personal characteristics. The "State" became a being, different from the aggregate of individuals comprehended within its territorial boundaries. Patriotism developed as a cult to foster this idea, and men have lived and died for the state, with a disregard for personal interests only equaled by that which the Christian martyrs showed. The sentiment expressed by Vergil, *Dulce et decore est, pro patria morior,* has not been among the least of the great motives that have stirred the human heart. In the face of this evidence, coincident almost with the dawn of history, we must admit that the characteristic of a distinct personality is not unsuitably attached to the organization of a political society.

From time to time there have been amplifications in the idea of the state. Of late, we believe, its importance has been vastly overemphasized. It has, in certain instances, become, not a means to an end, but an end in itself. The purer sentiments of patriotism have degenerated into a Baal-worship. The benevolent conception of the state, as the mother of her children, has given way to the sterner picture of a Moloch, into whose burning maw the dearest things of life must be hurled. While deprecating this misguided worship, and realizing that

the state is only an expedient for the better ordering of the lives of individuals, there yet remains enough of individuality and personality in the idea of the state so that we can assign to it certain rights and obligations, and speak with accuracy of a society of nations.

The rights of sovereignty are commonly classified; as (1) existence, (2) independence, (3) equality, (4) jurisdiction, (5) property, and (6) intercourse. These have all not the same antiquity as the recognized attributes of a state. By degrees each has come to take its place as a definite component of sovereignty. As nations have become more closely bound together, the precise limits of these rights have become increasingly important, and more exactly defined.

Permanent neutralization is either a seventh right of a state, or a complementary part to the right of existence or independence. By becoming permanently neutral a state does not take an action which invades any right of another state. It does not threaten its existence, compromise its independence, relegate it to an inferior station, limit its jurisdiction, take its property, nor curtail its intercourse. The fundamental rights of no state are infringed; and such an autonomous neutralization does not prevent or hinder the same neutralization on the part of every other state.

In establishing this principle as a right, we enter a field in the realm of sovereignty hitherto unexplored. A new dimension of the concept is discovered, which bears the only test which could challenge its validity; namely, any transgression of acknowledged rights already existing or of the new right when applied reciprocally. Obligations are implied, of course, but none which invade the sovereign prerogatives of a state. The acceptance of neutralization as a right adds to the complexity of sovereignty; but, in so doing, it also adds a higher connotation to sovereignty as a legal principle. Such a step is in the direction toward binding the world by a new *vinculum juris*, which should be fruitful in a more intimate understanding between nations, and hasten the day when the world can take steps to gather under a reign of law, and lay aside forever "that last dread arbiter." To abolish war, under the present legal *nexus* of our world, by the mere reiteration of its moral turpitude and by fervid invective against its dire destruction, is only a dream. To develop a basis of law that will ulti-

mately obviate war as a factor is a reasonable means to the realization of this dream.

The propaganda whereby these legal substitutes will supersede the more archaic conceptions must be the conviction that the unexplored fields of international law are yet vast; that the fruits therefrom are valuable; that discoveries therein are worthy of consideration; and, that conviction when acquired on any principle should be acted upon. In developing the right of autonomous neutralization as a sovereign right, the realm of application of no already existent right has been invaded. It is, therefore, a step in a new field, and its recognition must stir within all the determination to enforce it. Any infringement of this right, when enunciated by a sovereign state, should bring down the wrath of every other state, just as would the infringement of the right of existence. All the world must stand by these sovereign rights, if the world is to maintain its place of advancement. The world is even now at heart struggling to preserve these fundamental rights for the sake of their personal application to each state. The recalcitrant state must feel the weight of the world's hand at its throat. It is not only a concern of each state in its own interest, but it is the most altruistic of ideals, to strive to preserve intact those fundamental principles upon which the fabric of social life depends. When the invasion of sovereign rights can occur with impunity, it means that the world is receding with all speed to a state of international anarchy like that which brooded over Europe at the close of the Thirty Years' War. When any nation, for economic, moral, or political reasons, determines to assume the obligations and to demand the rights of a permanently neutral state, and when it has proclaimed that fact, it has in no way transcended its sovereign prerogatives, as we have shown, and the world must accept such a nation's act as binding, sanctioned by that ideal of law which has alone inspired all international life.

With such a conception of autonomous neutralization, we can readily see the nonessential character of the so-called guaranty, on which writers have set such great store as a ground for the validity of neutralization. As a *sine qua non* for state neutralization, a guaranty is of no value at all. The proclamation made by Switzerland in 1813 was the instrument which made that nation permanently neutral,

and not the Final Act of the Congress of Vienna two years later. But, when we discount entirely the juridical effect of a guaranty, let us not fail to acknowledge its psychological, and so, its political effect. The small boy may have a perfect right to the apple which the bully is holding from him, but that right seems far less worthy of consideration when enunciated by the aggrieved youngster than when announced by some bigger boy who stops to investigate the trouble.

Such a feeling exists among nations. Lawrence gave expression to it, when he said, "The agreement of the five Great Powers was held sufficient to elevate the neutralization of Switzerland into a principle of public law of Europe." . . .[1] Juridical right manifestly can have no such uncertain sanction as, "the agreement of the five Great Powers." Law must always be sharply distinguished from a mere *modus vivendi*. All civilized nations receive the principles which underlie sovereignty; the particular rights resulting therefrom are the objects of our investigation. A recent deduction, as yet imperfectly comprehended, may be strengthened and spread, if some "Great Powers" acknowledge it. Some nations, like some individuals, think at second hand. Therefore, we should look at a guaranty of neutralization, in the case of autonomous states, not as a proof that neutralization is valid, but as evidence that it is known. Its validity is arrived at deductively, its existence only is to be discovered empirically.

In an article on "The Position of Luxemburg According to International Law," M. Eyschen[2] goes into great detail through many pages, trying to ferret out of the enigmatical words of certain statesmen just what the responsibility of Europe was for Luxemburg's permanent neutralization. What those statesmen said was interesting evidence as to what they thought about the question; but it would be dangerous to maintain that what they said affected juridically the position of every European state in regard to Luxemburg. That state, as sovereign and independent, in 1848 proclaimed itself neutral forever. By that act every Power in the world was bound to respect its neutralization. The voice of sovereignty had spoken that which was its right

[1] Lawrence, T. J., Essays on Modern International Law, p. 487.

[2] Eyschen, M. P., *La Position du Luxemburg selon les Droits des Gens* in *Revue de Droit International et de Législation Comparée* (1903).

to speak; and no nation, as it esteemed its own sovereign rights, could dare gainsay it. We have a rather cynical, although perhaps characteristic, comment, made by Bismarck to the English Ambassador, quoted in the essay already cited, that, while he recognized a moral obligation to reckon on Luxemburg's neutralization, he did not consider this an "intrinsic guaranty." Just what he meant by this could, perhaps, never have been explained until lately. Hardly more lofty was the conception of Lord Stanley, who participated in the negotiations of 1867 for England. On June 14, he enunciated the British idea of the obligation.

> Further, the guaranty now given is collective only. That is an important distinction. It means this, that in the event of a violation of neutrality, all the Powers who have signed the treaty may be called upon for their collective action. No one of those Powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability. We are bound in honor, — you cannot place a legal construction upon it, — to see, in concert with others, that these arrangements are maintained. But, if the other Powers join with us, it is certain that there will be no violation of neutrality. If they, situated exactly as we are, decline to join, we are not bound single handed to make up for the deficiencies of the rest. Such a guaranty has obviously rather the character of a moral sanction to the arrangements which it defends, than that of a contingent liability to make war. It would be a question to consider when the occasion arose. The House would be the judge as to whether such an extreme course was desirable or not.[3]

The occasion did arise, and to her honor England arose to it, and the House did decide, that the sovereign right of a state was a moral obligation, and as such the highest possible obligation. A response like that can only come from a nation which prizes the rights of sovereignty that are hers. England has jealously guarded these rights in times past and can feel best their value; and it was not surprising that she would quickly succor others when their rights were threatened. The words of Lord Stanley indicated a realization, perhaps frightful to him at the time, that there was in this doctrine of neutralization that which hypothecated a sovereign right, and its converse, a universal obligation. The absence of the force to compel obedience to the principle blinded him to the existence of the principle.

[3] Eyschen, M. P. *La Position du Luxemburg selon Droits des Gens* in *Revue de Droit International et de Législation Comparée* (1903), p. 23.

Having shown that in autonomous neutralization we have a right, the question at once arises, What are the obligations which it involves? There are several. First, a state, upon assuming the condition, agrees to control its action in certain respects. As regards fortifications, "Although no definite rule can be laid down . . . where no provision is made, the right to construct and maintain fortresses remains."[4] Armaments and neutralization are opposed in spirit. In these days we are hearing much of the value or danger of military establishments. In general, it seems fair to say that the soundness of our trust in law is indicated by the size of our armament. Civilization discards her weapons, as her trust in other means of protecting her rights increases. Internationally, we are in a state of affairs analogous to our own western frontier a few decades ago. There existed the forms of law, but the rope, bowie-knife, and revolver were always at hand. And they did not cease to be readily resorted to, until the minds of people felt that in law they had a surer means of justice.

When the right of neutralization is exercised by every nation, and that day is surely coming, fortifications will be useless. They will moulder like the rusty flint-lock over the chimney. But today, while autonomous neutralization is a right imperfectly exacted, and not allowed by all nations, like another musket, fortifications must stand "ready behind the door." Switzerland put two hundred thousand men on her frontiers in 1870, and three hundred thousand in 1914. The Swiss have shown themselves ready to defend their neutrality by well armed and disciplined battalions of hardy mountaineers. In the case of Belgium, her frontier defenses were limited, and those of little Luxemburg were eliminated altogether. In the light of recent events, the comparative wisdom of these two courses may be judged by each for himself.

Whether a neutralized state may contract alliances is a mooted point. Certain kinds of alliances are, obviously, not permissible. Any offensive alliance would be a direct contravention of the spirit and letter of neutralization. M. Kleen holds that a neutralized state is deprived of the right of contracting even a defensive alliance, for this might lead to a declaration of war to defend a right attacked. On the

[4] Wicker, Cyrus F., "Some Effects of Neutralization," this JOURNAL, July, 1911 (Vol. V), p. 642.

other hand, Rivier would allow "a neutralized state to conclude defensive alliances, but only those where the ally was bound to defend it, and not where it is bound to defend the ally."

Certain political affiliations seem to be also perfectly compatible with such a condition. Luxemburg and Holland, for instance, maintained a union under one rule for many years until 1890. Alliances for economic and political efficiency are the best assurance for a neutralized state. The more of them that it can contract the better. And in general, a true idea of the concept involved in the right of neutralization, which is to bind the world closer, will prompt a state to tie itself as closely as possible by every peaceful treaty which it can make to as many states as possible. Tariff unions are one of the most general forms of international alliances. Such unions as the Postal exert no influence, that is, not in the direction of a closer and better understanding between nations, and offers no dangerous possibilities for a neutralized state. Indeed, the greatest ultimate good is going to flow from stressing our points of economic and social contact with other states. It was largely the economic difficulties over the various tariffs of our own States under the Confederation that led to a firmer union; and the *Zollverein* was the parent of the present German Empire.

Lastly, take the matter of colonial possessions as a very interesting case in point in the discussion of this subject. At present the autonomous neutralization of any of the larger states of the world seems to be an impossibility. There are many practical difficulties which would make such a state hesitate. It is true that, as yet, this attribute of sovereignty is not completely understood. But, while every large nation would decline to accept permanent neutrality for herself, she would be quite willing to protect her outlying dependencies in this way. A very large part of the armaments that have oppressed the peoples of Europe for so long have been justified by the existence of island possessions.

Some one will ask, Why is it that a state has a clear right to declare itself permanently neutralized, and yet has not a similar right to declare some island possession permanently neutral, without accepting such a condition for itself? In such a case a nation, if not neutralized herself, is demanding an international protection. She is demanding

that, in case war breaks out, the enemy must respect her possession in safety of what may be her most vulnerable point of attack. Such a demand has nothing to do with a nation's life or safety *per se*. It does ask for an immunity from the dangers of war and to be so placed in a more favorable position to carry on an aggressive program in another quarter. When the nation is herself neutralized the problem is simple. No reasons exist which should prevent a neutralized state from including her colonies under her protection. In fact if this condition be not allowed very little good accrues from the neutralization of the state proper. A nation, by virtue of its sovereignty, may determine its own status; but, to ask for special immunities with respect to its outlying territories, if it be not itself neutralized, takes us at once beyond the bounds of a sovereign right into the realm of political privilege. Nations hesitate to grant such privileges to their neighbors, because a degree of national restraint is assumed which is far ahead of almost any nation's capacity in this day. Is there, then, any way in which this process can be utilized in trying to solve the problem of possessions far from the home country?

Let us consider the Philippine Islands. We are even now considering cutting them off from our protection. It is the present policy of this government to cease its responsibility over their fortunes at the earliest date. There is no question but that today they are a liability to us; and at any time the eventualities of war may involve our country in great embarrassment, not to say danger, on account of them. The only way to secure their immunity, as a dependency of the United States, is by an international agreement. Any proclamation on the part of the United States alone to this effect would be little short of a pitiable spectacle of national presumption. No nation can maintain creditably a position of political dictatorship, transcending the bounds of its right, except with the backing of a sufficient armament.

Again, it would be extremely difficult to get even a few states to agree to the internationalization of the Philippines as an American possession. Japan is now obsessed with the spirit of extension. Germany is in the Orient. China has a right to consideration, and at no far distant day may prove herself well able to demand that consideration in her own name.

There is another course. Do not proclaim the neutralization of these islands. Do not ask a group of the Powers to insure their immunity. Nor would it be wise to cut them adrift as an independent state. They would soon find themselves within the sphere of influence of some other Power serving as a convenient naval base for extensive operations in the Pacific. Along with their independence and self-government, for which we are diligently preparing them, instruct them in this prerogative of a sovereign state. Then we may turn them off. Immediately upon their emancipation, the Philippine Islands can proclaim, in their own right, their permanent neutrality. As an independent nation, they can assume the plenitude of their powers.

Such a course obviously puts all nations in a new relation to this island state. The United States, then, could logically and with good grace acknowledge this condition, and adequate recognition would be straightway forthcoming. As a traditional sponsor for the political aspirations of a people desiring individual autonomy, states like France and England would be inclined to recognize the new nation, and there would be a well defined proclivity to recognize its neutralization, as well as its existence and independence.

Such an event, by itself, may seem entirely too ideal and academic. Like the economists' island, there is no such thing. But, with the example before them, would not other nations see a suitable way of treating certain of their own isolated possessions, where there is already a flourishing indigenous economic and political life? Why should not England, whose colonial policy since the Quebec Act has been increasingly individualistic, feel impelled to treat certain of its dependencies in this way?

The formation of a state in this manner, coupled with its subsequent autonomous neutralization, would be a boon to the cause of individual liberty; and, small though it was, it would add to the number of little states, neutralized and existing solely for the economic and moral welfare of the people dwelling therein. Such little states are ultimately to be the cement by which any larger system of world union will be bound together. One writer has expressed it thus:

> Neutralization would recognize the individual right of the nationality to its own existence and to its own progress, though that progress

might be less rapid than expected by the civilized world, and certainly much slower than would be desired by the greed of the exploiter. It is for the law of nations, like the ordinary laws of society, to recognize, to respect, and to secure individual liberty.[5]

This process could be applied to several outlying colonial possessions of the present larger states of the world. With a few cases existing, the acknowledgment of the right would become increasingly more natural, till it finally was a matter of course. With that sort of sentiment lies the opportunity to lay the foundations for a world neutralization, carried out by the larger Powers, which is the great desideratum. World peace must be reached through a chain of events. Disarmament, when every nation is tensely sensitive, is out of the question. Witness Winston Churchill's proposition to Germany, and its effect. Disarmament is the last step in the chain. Men lay aside their weapons when they feel that they need them no longer. When colony after colony has been made, first, independent, then, at its request, been recognized as neutralized by its mother country and other countries; and this has been done in various cases, and made to include most of the colonial possessions of the world, armaments will of necessity disappear. In other words, a new custom will have sprung into existence. A principle of international law will have become sanctioned by usage. This is a natural process, needing only the idealist among the nations to spread it. The United States has played this role before. In the case of the Philippines she might illustrate this new conception of right and vindicate its validity. Such a step would not entail any added danger, for it would only continue our responsibility over these islands which would be shared, in theory, by other nations, and at worst would be no more arduous than it is at present.

STEWART MACMASTER ROBINSON.

[5] Winslow, Erving, "Neutralization," this JOURNAL, April, 1908 (Vol. II), p. 376.

EDITORIAL COMMENT

THE UNITED STATES AT WAR WITH THE IMPERIAL GERMAN GOVERNMENT

On the second day of April, 1917, President Wilson appeared before the Congress of the United States and, after setting forth the lawless actions of the Imperial German Government and the impossibility of protecting the lives and property of his fellow countrymen engaged in pursuits which have always "even in the darkest periods of modern history, been deemed innocent and legitimate" advised the Congress of the United States to declare the existence of a state of war between the Imperial German Government and the United States. On the sixth day of April, 1917, the Congress, after grave deliberation and with a full sense of the responsibility which it would thus assume, declared a state of war to exist between the Imperial German Government and the United States.[1]

What were the reasons which caused the President of the United States to advise the Congress to declare the existence of a state of war between the Imperial German Government and the United States; what were the reasons which caused the Congress to act upon the advice of the President to declare the existence of a state of war between the two countries; and what are the consequences which the President, the Congress, and the people of the United States consider as likely to follow from this state of war and its effective prosecution? We do not need to speculate as to the reasons, for the President himself has stated them, and if he had not they would be sufficiently in evidence, as the actions of Germany since the first day of August, 1914, in so far as the United States is concerned, speak louder than words; and we do not need to indulge in prophecy in order to forecast the consequences of this declaration on behalf of the United States, for the President himself has stated, in clear and unmistakable terms, that the autocracy which made these acts possible should end with the war.

[1] The President's address and the resolution of Congress are printed in the Supplement to this JOURNAL, pp. 143, 151.

The first part of the President's address deals with the specific acts of the Imperial German Government as causes of the war. The second part deals with the motives and purposes of the United States in entering the war, for while the acts of the Imperial German Government would justify resistance on behalf of the United States, the President wished it clearly to be understood, and therefore he put it plainly, that the motive and purpose in entering the war which had been thrust upon the United States was not merely to secure redress for the loss of property, not even redress for the destruction of human life, but to secure the repudiation of the Prussian conception of state and government, which could force a people to commit such acts, and to secure some form of international organization calculated to guarantee peace among nations through the administration of justice.

As far as the United States is concerned, the cause of its war with the Imperial German Government is the submarine, for the disputes of a serious nature and of a kind calculated to produce war between the two governments related to the conduct of the submarine, which, because Great Britain controlled the seas, was the only form of maritime warfare left to Germany; and Germany was apparently as unwilling to renounce maritime warfare as it was unwilling to allow its surface fleet to put to sea and to give battle to the British Navy. The United States did not object to the employment of the submarine, recognizing it as a vessel of war, possessed of all the rights of a vessel of war and subject to all the duties of a vessel of war. But the United States insisted from the beginning that the submarine should conform its actions to the rules of law to which vessels of war were subjected, and that, if it could not or would not conform its actions to such rules, it should not be used; for the law could not be changed to suit the submarine, which should itself be changed to meet the law if it could not, as then constructed, comply with the law as it then stood.

The Imperial German Government, on the contrary, insisted that, because of its frailty, the submarine could not comply with the laws and customs of war controlling the acts of surface vessels, that it could not comply with the formalities of visit and search, because, to do so, it would have to comport itself as a surface vessel, and as a surface vessel it would endanger its existence if it approached within gunshot of ordinary surface vessels. The Imperial German Government claimed for the submarine the right to operate under the surface to protect itself from attack, and, thus protected, to attack any vessel approach-

ing it because, under the surface, it could not distinguish the vessel of the enemy from the vessel of a neutral Power; it claimed the right to attack the vessel within range without warning because, if it gave warning, it exposed itself to danger; and finally, it claimed the right to torpedo and thus destroy the vessel without first putting its passengers and crew in a place of safety because the submarine was too small to take them on board.

If matters had rested here the question at issue between the two governments would have been academic. But matters did not rest here because the Imperial German Government put its conception of submarine warfare into practice, with the result, as the President informed the Congress in his address of the second of April, 1917, that "Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents. Even hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium, though the latter were provided with safe conduct through the proscribed areas by the German Government itself and were distinguished by unmistakable marks of identity, have been sunk with the same reckless lack of compassion or of principle."

In the report of the Committee on Foreign Affairs of the House of Representatives accompanying the text of the declaration of a state of war with the Imperial German Government, numerous instances are given justifying the President's indictment, and while these instances are but few of the many, they are given as a sample of the indiscriminate submarine warfare of the Imperial German Government.

After a brief reference to the diplomatic correspondence between the two governments, in which Germany stated that instructions had been given "to abstain from all violence against neutral vessels recognizable as such" and that "it is very far indeed from the intention of the German Government . . . ever to destroy neutral lives and neutral property," the official report to which reference has been made continues:

> Nevertheless the German Government proceeded to carry out its plans of submarine warfare and torpedoed the British passenger streamer *Falaba* on March 27, 1915, when one American life was lost, attacked the American steamer *Cushing* April 28 by airship, and made submarine attacks upon the American tank steamer *Gulflight* May 1, the British passenger liner *Lusitania* May 7 when 114 American

lives were lost, and the American steamer *Nebraskan* on May 25, in all of which over 125 citizens of the United States lost their lives, not to mention hundreds of noncombatants who were lost and hundreds of Americans and noncombatants whose lives were put in jeopardy.

The British mule boat *Armenian* was torpedoed on June 28, as a result of which 20 Americans are reported missing.

After a further reference to the diplomatic correspondence, the official report thus proceeds:

Subsequently, the following vessels carrying American citizens were attacked by submarines:

British liner *Orduna* July 9.
Russian steamer *Leo* July 9.
American steamer *Leelanaw* July 25.
British passenger liner *Arabic* August 19.
British mule ship *Nicosian* August 19.
British steamer *Hesperian* September 4.

In these attacks 23 Americans lost their lives, not to mention the large number whose lives were placed in jeopardy.

After another reference to diplomatic correspondence, citing German promises, the official report continues:

Following this accumulative series of assurances, however, there seems to have been no abatement in the rigor of submarine warfare, for attacks were made in the Mediterranean upon the American steamer *Communipaw* on December 3, the American steamer *Petrolite* December 5, the Japanese liner *Yasaka Maru* December 21, and the passenger liner *Persia* December 30. In the sinking of the *Persia* out of a total of some 500 passengers and crew only 165 were saved. Among those lost was an American consul traveling to his post.

After again referring to correspondence between the two countries, continuing the assurance of the German Government, in the language of the report, "that neutral and enemy merchant vessels, passenger as well as freight ships, should not be destroyed except upon the passengers and crew being accorded safety," the official report thus chronicles the loss of life and property during the year 1916:

On March 1, 1916, the unarmed French passenger steamer *Patria*, carrying a number of American citizens was attacked without warning. On March 9 the Norwegian bark *Silius*, riding at anchor in Havre Rhodes, was torpedoed by an unseen submarine and one of the seven Americans on board was injured. On March 16 the Dutch passenger steamer *Tubantia* was sunk in the North Sea by a torpedo. On March 16 the British steamer *Berwindale* was torpedoed without warning off Bantry Island with four Americans on board. On March 24 the British unarmed steamer *Englishman* was, after a chase, torpedoed and sunk by the submarine *U. 19*, as a

result of which one American on board perished. On March 24 the unarmed French cross-channel steamer *Sussex* was torpedoed without warning, several of the 24 American passengers being injured. On March 27 the unarmed British liner *Manchester Engineer* was sunk by an explosion without prior warning, with Americans on board, and on March 28 the British steamer *Eagle Point*, carrying a Hotchkiss gun, which she did not use, was chased, overtaken, and sunk by a torpedo after the persons on board had taken to the boats.

And after a final reference to the correspondence between the two governments, resulting in the assurance of May 4, 1916, that new orders had been issued to the German naval forces "in accordance with the general principles of visit and search and the destruction of merchant vessels recognized by international law," and quoting the withdrawal of this assurance contained in the German note of January 31, 1917, the report continues and concludes as follows this phase of the question:

On February 3 [1917] one American ship was sunk, and since that date six American ships flying the American flag have been torpedoed, with a loss of about 13 American citizens. In addition, 50 or more foreign vessels of both belligerent and neutral nationality with Americans on board have been torpedoed, in most cases without warning, with a consequent loss of several American citizens.

The President's statement thus appears to be borne out by the facts, for enemy merchant vessels carrying passengers or freight, and neutral vessels, of whatever nationality, have indiscriminately been sunk by the German submarine lying in wait for its prey.

But there is a further charge made by the President of even a more serious character, for in the address of the second of April he states that "hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium" had been destroyed by German submarines, although these vessels were supposed to be protected by the promise of the Imperial German Government, evidenced by safe-conducts. On this point the official report previously quoted says:

When the Commision for Relief in Belgium began its work in October, 1914, it received from the German authorities, through the various Governments concerned, definite written assurances that ships engaged in carrying cargoes for the relief of the civil population of Belgium and northern France should be immune from attack. In order that there may be no room for attacks upon these ships through misunderstanding each ship is given a safe-conduct by the German diplomatic representative in the country from which it sails, and, in addition, bears conspicuously upon its sides markings which have been agreed upon with the German authorities; furthermore, similar markings are painted upon the decks of the ships in order that they may be readily recognizable by aeroplanes.

Upon the rupture of relations with Germany the commission was definitely assured by the German Government that its ships would be immune from attack by following certain prescribed courses and conforming to the arrangements previously made.

Despite these solemn assurances there have been several unwarranted attacks upon ships under charter to the commission.

On March 7 or 8 the Norwegian ship *Storstad*, carrying 10,000 tons of corn from Buenos Aires to Rotterdam for the commission was sunk in broad daylight by a German submarine despite the conspicuous markings of the commission which the submarine could not help observing. The *Storstad* was repeatedly shelled without warning and finally torpedoed.

On March 19 the steamships *Tunisie* and *Haelen*, under charter to the commission proceeded to the United States under safe conducts and guarantees from the German minister at The Hague and bearing conspicuous markings of the commission, were attacked without warning by a German submarine outside the danger zone (56° 15′ north, 5° 32′ east). The ships were not sunk, but on the *Haelen* seven men were killed, including the first and third officers; a port boat was sunk; a hole was made in the port bunker above the water line; and the ships sustained sundry damages to decks and engines.

In a latter portion of the President's address he calls attention to the difficulty of maintaining peace with the Imperial German Government and enumerates a series of transactions within American jurisdiction comparable to the conduct of the submarine warfare upon the high seas. They are apparently not enumerated by the President as in themselves the cause of war but as a matter of aggravation. Thus he says:

One of the things that has served to convince us that the Prussian autocracy was not and could never be our friend is that from the very outset of the present war it has filled our unsuspecting communities and even our offices of government with spies and set criminal intrigues everywhere afoot against our national unity of counsel, our peace within and without, our industries and our commerce. Indeed it is now evident that its spies were here even before the war began; and it is unhappily not a matter of conjecture but a fact proved in our courts of justice that the intrigues which have more than once come perilously near to disturbing the peace and dislocating the industries of the country have been carried on at the instigation, with the support, and even under the personal direction of official agents of the Imperial Government accredited to the Government of the United States. Even in checking these things and trying to extirpate them we have sought to put the most generous interpretation possible upon them because we knew that their source lay, not in any hostile feeling or purpose of the German people toward us (who were, no doubt, as ignorant of them as we ourselves were), but only in the selfish designs of a Government that did what it pleased and told its people nothing. But they have played their part in serving to convince us at last that that Government entertains no real friendship for us and means to act against our peace and security at its

convenience. That it means to stir up enemies against us at our very doors the intercepted note to the German Minister at Mexico City is eloquent evidence.

In the official report of the Committee on Foreign Affairs of the House of Representatives, containing the instances of German submarine warfare, there is an elaborate but far from complete enumeration of the acts of German officials and of German sympathizers in the domestic affairs of the United States. The few instances actually stated, which are to be taken as a sample of the many which are not chronicled, are twenty-one in number and are thus stated in the report in brief and summary form:

1. By direct instructions received from the foreign office in Berlin the German Embassy in this country furnished funds and issued orders to the Indian independence committee of the Indian Nationalist Party in the United States. These instructions were usually conveyed to the committee by the military information bureau in New York (von Igel) or by the German consulates in New York and San Francisco.

Dr. Chakrabarty, recently arrested in New York City, received, all in all, according to his own admission, some $60,000 from von Igel. He claims that the greater portion of this money was used for defraying the expenses of the Indian revolutionary propaganda in this country, and, as he says, for educational purposes. While this is in itself true, it is not all that was done by the revolutionists. They have sent representatives to the Far East to stir up trouble in India and they have attempted to ship arms and ammunition to India. These expeditions have failed. The German Embassy also employed Ernest T. Euphrat to carry instructions and information between Berlin and Washington under an American passport.

2. Officers of interned German warships have violated their word of honor and escaped. In one instance the German consul at Richmond furnished the money to purchase a boat to enable six warrant officers of the steamer *Kronprinz Wilhelm* to escape after breaking their parole.

3. Under the supervision of Capt. von Papen and Wolf von Igel, Hans von Wedell and, subsequently, Carl Ruroede maintained a regular office for the procurement of fraudulent passports for German reservists. These operations were directed and financed in part by Capt. von Papen and Wolf von Igel. Indictments were returned, Carl Ruroede sentenced to the penitentiary, and a number of German officers fined. Von Wedell escaped and has apparently been drowned at sea. Von Wedell's operations were also known to high officials in Germany. When Von Wedell became suspicious that forgeries committed by him on a passport application had become known, he conferred with Capt. von Papen and obtained money from him wherewith to make his escape.

4. James J. F. Archibald, under cover of an American passport and in the pay of the German Government through Ambassador Bernstorff, carried dispatches for Ambassador Dumba and otherwise engaged in unneutral activities.

5. Albert Sanders, Charles Wunnonberg, and others, German agents in this country, were engaged, among other activities, in sending spies to England equipped

with American passports, for the purpose of securing military information. Several such men have been sent. Sanders and Wunnonberg have plead guilty to indictments brought against them in New York City as has George Voux Bacon, one of the men sent abroad by them.

6. American passports have been counterfeited and counterfeits found on German agents. Baron von Cupenberg, a German agent, when arrested abroad, bore a counterfeit of an American passport issued to Gustav C. Roeder; Irving Guy Ries received an American passport, went to Germany, where the police retained his passports for 24 hours. Later a German spy named Carl Paul Julius Hensel was arrested in London with a counterfeit of the Ries passport in his possession.

7. Prominent officials of the Hamburg-American Line, who under the direction of Capt. Boy-Ed, endeavored to provide German warships at sea with coal and other supplies in violation of the statutes of the United States, have been tried and convicted and sentenced to the penitentiary. Some 12 or more vessels were involved in this plan.

8. Under the direction of Capt. Boy-Ed and the German consulate at San Francisco, and in violation of our laws, the steamships *Sacramento* and *Mazatlan* carried supplies from San Francisco to German war vessels. The *Olsen and Mahoney*, which was engaged in a similar enterprise, was detained. The money for these ventures was furnished by Capt. Boy-Ed. Indictments have been returned in connection with these matters against a large number of persons.

9. Werner Horn, a lieutenant in the German Reserve, was furnished funds by Capt. Franz von Papen and sent, with dynamite, under order to blow up the International Bridge at Vanceboro, Me. He was partially successful. He is now under indictment for the unlawful transportation of dynamite on passenger trains and is in jail awaiting trial following the dismissal of his appeal by the Supreme Court.

10. Capt. von Papen furnished funds to Albert Kaltschmidt, of Detroit, who is involved in a plot to blow up a factory at Walkerville, Canada, and the armory at Windsor, Canada.

11. Robert Fay, Walter Scholtz, and Paul Daeche have been convicted and sentenced to the penitentiary and three others are under indictment for conspiracy to prepare bombs and attach them to allied ships leaving New York Harbor. Fay, who was the principal in this scheme, was a German soldier. He testified that he received finances from a German secret agent in Brussels, and told von Papen of his plans, who advised him that his device was not practicable, but that he should go ahead with it, and if he could make it work he would consider it.

12. Under the direction of Capt. von Papen and Wolf von Igel, Dr. Walter T. Scheele, Capt. von Kleist, Capt. Wolpert, of the Atlas Steamship Co., and Capt. Rode, of the Hamburg-American Line, manufactured incendiary bombs and placed them on board allied vessels. The shells in which the chemicals were placed were made on board the steamship *Frederick der Grosse*. Scheele was furnished $1,000 by von Igel wherewith to become a fugitive from justice.

13. Capt. Franz Rintelen, a reserve officer in the German Navy, came to this country secretly for the purpose of preventing the exportation of munitions of war to the allies and of getting to Germany needed supplies. He organized and financed Labor's National Peace Council in an effort to bring about an embargo on the shipment of munitions of war, tried to bring about strikes, etc.

14. Consul General Bopp, at San Francisco, Vice Consul General Von Schaick, Baron George Wilhelm von Brincken (an employee of the consulate), Charles C. Crowley, and Mrs. Margaret W. Cornell (secret agents of the German consulate at San Francisco) have been convicted of conspiracy to send agents into Canada to blow up railroad tunnels and bridges, and to wreck vessels sailing from Pacific coast ports with war materials for Russia and Japan.

15. Paul Koenig, head of the secret-service work of the Hamburg-American Line, by direction of his superior officers, largely augmented his organization and under the direction of von Papen, Boy-Ed, and Albert carried on secret work for the German Government. He secured and sent spies to Canada to gather information concerning the Welland Canal, the movements of Canadian troops to England, bribed an employee of a bank for information concerning shipments to the allies, sent spies to Europe on American passports to secure military information, and was involved with Capt. von Papen in plans to place bombs on ships of the allies leaving New York Harbor, etc. Von Papen, Boy-Ed, and Albert had frequent conferences with Koenig in his office, at theirs, and at outside places. Koenig and certain of his associates are under indictment.

16. Capt. von Papen, Capt. Hans Tauscher, Wolf von Igel, and a number of German reservists organized an expedition to go into Canada, destroy the Welland Canal, and endeavor to terrorize Canadians in order to delay the sending of troops from Canada to Europe. Indictments have been returned against these persons. Wolf von Igel furnished Fritzen, one of the conspirators in this case, money on which to flee from New York City. Fritzen is now in jail in New York City.

17. With money furnished by official German representatives in this country, a cargo of arms and ammunition was purchased and shipped on board the schooner *Annie Larsen*. Through the activities of German official representatives in this country and other Germans a number of Indians were procured to form an expedition to go on the steamship *Maverick*, meet the *Annie Larsen*, take over her cargo, and endeavor to bring about a revolution in India. This plan involved the sending of a German officer to drill Indian recruits and the entire plan was managed and directed by Capt. von Papen, Capt. Hanz Tauscher, and other official German representatives in this country.

18. Gustav Stahl, a German reservist, made an affidavit which he admitted was false, regarding the armament of the *Lusitania*, which affidavit was forwarded to the State Department by Ambassador Bernstorff. He pled guilty to an indictment charging perjury, and was sentenced to the penitentiary. Koenig, herein mentioned, was active in securing this affidavit.

19. The German Embassy organized, directed, and financed the Hans Libeau Employment Agency, through which extended efforts were made to induce employees of manufacturers engaged in supplying various kinds of material to the allies to give up their positions in an effort to interfere with the output of such manufacturers. Von Papen indorsed this organization as a military measure, and it was hoped through its propaganda to cripple munition factories.

20. The German Government has assisted financially a number of newspapers in this country in return for pro-German propaganda.

21. Many facts have been secured indicating that Germans have aided and encouraged financially and otherwise the activities of one or the other factions in

Mexico, the purpose being to keep the United States occupied along its borders and to prevent the exportation of munitions of war to the allies; see, in this connection, the activities of Rintelen, Stallforth, Kopf, the German consul at Chihuahua, Krum-Hellen, Felix Somerfeld (Villa's representative at New York), Carl Heynen, Gustav Steinberg, and many others.

It will be observed that these interferences with the domestic economy of the United States were at a time when this country was neutral, when the Imperial German Secretary of State for Foreign Affairs abounded in expressions of friendship and consideration, and when the Imperial German Ambassador enjoyed the hospitality of a neutral country, whose rights upon the high seas had been systematically violated by the Imperial German Ambassador, members of the official staff, and partisans of Germany in his employ. It is hard to believe that these things are so, yet the Zimmermann letter would lead us to suspect them, if stated on credible authority, and the authority upon which we have them is that of the Government of the United States, in many instances the judgments of courts of the United States in which the transactions had been established by proof and the perpetrators convicted of their commission and sentenced to prison in judicial proceedings in accordance with the laws of the United States. The text of the Zimmermann letter, as contained in the report of the Committee on Foreign Affairs, is as follows:

Berlin, *January 19, 1917*

On the first of February we intend to begin submarine warfare unrestricted. In spite of this it is our intention to endeavor to keep neutral the United States of America.

If this attempt is not successful we propose an alliance on the following basis with Mexico: That we shall make war together and together make peace. We shall give general financial support, and it is understood that Mexico is to reconquer the lost territory in New Mexico, Texas, and Arizona. The details are left to you for settlement.

You are instructed to inform the President of Mexico of the above in the greatest confidence as soon as it is certain there will be an outbreak of war with the United States, and suggest that the President of Mexico on his own initiative should communicate with Japan suggesting adherence at once to this plan; at the same time offer to mediate between Germany and Japan.

Please call to the attention of the President of Mexico that the employment of ruthless submarine warfare now promises to compel England to make peace in a few months.

(Signed) ZIMMERMANN.

It was therefore under the eyes of Congress, as it was in the mind of the President and in the heart of the American people. Without it there were causes of war, with it there was slight chance that war

could be avoided. It is doubtful whether it would have produced war if there had not been other and impelling reasons for the resort to arms. It is doubtful if it can properly be included among the causes of the war, certainly it was not a distinct cause; it was rather the culmination of a series of unfriendly acts and it showed the spirit and purpose with which those acts had been committed. It was rather a matter of aggravation, throwing fuel on the flames, than creating of itself a conflagration.

The President properly stated in his address of April 2d to the Congress that he was assuming a grave responsibility in recommending a declaration of the existence of a state of war against the Imperial German Government, for the day has long since passed, at least in democratic countries, where the head of a state, whether he be monarch or president, can go to war as the king went a-hunting. War may be an imperial, it is no longer a royal, sport, and it never has been and it never will be, it is to be hoped, a presidential one. War is ordinarily declared in a moment of excitement and reason is likely to be swayed by enthusiasm; but we cannot today in democracies justify a declaration of war unless the cause be just, and, however we may deceive ourselves, we cannot deceive posterity, which passes alike upon the acts of autocrat, constitutional monarch, president, and people. We must decide according to our knowledge of present conditions and according to these conditions our actions are to be judged in the first instance, but the future must finally decide the question.

The President has stated the case of the United States against the Imperial Government clearly and in detail. He enumerated the special reasons which, in his opinion, would be a proper cause of armed action. He has searched his own heart and the conscience of the American people, that the motives and objects of the war may not only justify but require in the given circumstances and conditions the declaration of a state of war. It is indeed a grave responsibility which the President assumed in recommending the war, which the Congress assumed in declaring its existence, and which the people of the United States assumed in carrying it on.

We believe that the reasons given are causes, not pretexts, that the motives and purposes are sincere and sufficient; but on all these matters posterity has the final word — for whether we will or no, "Die Weltgeschichte ist das Weltgericht."

JAMES BROWN SCOTT.

THE RELATIONS BETWEEN THE UNITED STATES AND THE CENTRAL POWERS

The actual status of the relations between the United States and the Central Powers, so far as we are officially informed, is as follows:

The United States has declared war upon Germany, while Germany has said and done nothing in reply.

Austria-Hungary, Turkey and Bulgaria have ceased diplomatic relations with this country, which in turn has taken similar action, but no war between them has been declared.

The three Powers just named are in offensive and defensive coöperation with Germany, with whatever consequences that may imply as regards Germany's enemies.

The problem is to determine the nature of our relations with the four states above mentioned.

And first as to Germany.

Article 1 of Hague Convention No. 3, 1907, is as follows:

> The contracting Powers recognize that hostilities between them must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

This was ratified by both Germany and the United States.

Accordingly, having exhausted all others means of protection, and authorized by Congress, war was declared against the Imperial Government of Germany in these words "a state of war exists." It was, therefore, not a conditional, but an absolute announcement. This was on the 6th of April, 1917. From that day to this, so far as appears, no counter declaration has been made by Germany, nor has any aggressive act taken place up to the time of writing other than further submarine attacks upon American ships of trade and their attempts at defense.

Nevertheless, no one can doubt that war exists, reciprocal war, no matter what formalities Germany may have dispensed with.

Next as to Austria-Hungary. There is here no doubt of an alliance with our enemy Germany, an alliance nominally defensive. Although the exact terms are not accessible, the main provision is well known, namely, that Austria is bound to coöperation in arms with Germany if the latter is attacked by two Powers, meaning France and Russia. Italy was similarly bound, but decided that the war was offensive,

not defensive, and that therefore no *casus foederis* had arisen. But Austria thought otherwise. The question for us then is, if we, being at war with Germany, are likewise automatically at war with Austria, the ally of Germany, although so far as public official statements show we have merely severed diplomatic relations.

Text-book opinion bearing on this topic is neither plentiful nor uniform.

Bynkershoek thought that "allies form one state" with a confederated belligerent; and Phillimore approves, saying:

> This principle, duly considered and applied, furnishes a solution for all questions relating to the position, the duties and the rights of an ally. Thus for instance, the doctrine that all commerce and communication is interdicted with the enemy is enforced, not only against the subjects of the belligerent but also against those of the ally, upon the supposition that the rule was founded on a strong and universal principle which allied states in war had a right to notice and apply mutually to each other's subjects.

On the other hand, Halleck says plainly that "the simple fact of there being an alliance between our enemy and other nations would not justify us in treating such nations as belligerents." He declares further:

> A warlike alliance made by a third party before the war with a state, then our friend but now our enemy, will not as a general rule be of itself a sufficient cause for commencing hostilities against such third party; for there may be good reason why he should not regard himself as bound by the obligations of the alliance. It would certainly be very impolitic, as well as improper, for us to treat as a belligerent one who may not be disposed to become our enemy.

To this Creasy adds:

> You certainly have a right in such a case to call upon the ally of your opponent to declare whether he means to act against you or not; and if he refuses to give an express renunciation of hostile intentions toward you, you are in every way justified in forthwith treating him as your enemy, unless you consider as above explained, that it is for your interest to forbear from doing so.

Perhaps in the case of our present relations with Austria these two principles will be found reconcilable and can be combined. We should certainly forbid trading with her as akin to trading with an enemy, for to supply her with rubber, copper, flour, let alone munitions of war, is equivalent to supplying Germany with them. On the other hand, we may well await the issue of events before unnecessarily taking on another enemy. If Austrian submarines attack our ships, we shall

defend them; and if we choose to insist upon a disclaimer of the right to torpedo without warning, that is a conditional ultimatum with war declared in the background. As matters stand, we may fairly say, I think, that Austria stands to us in certain aspects as an enemy, but that this as yet does not imply active declared hostilities.

As regards Turkey, the case is yet more indistinct. Turkey was thrust into the war through the boat attack upon Odessa which was due to German intrigue. This was followed by the preaching of a Holy War, which in turn led to the British declaration of November 5, 1914, that "a state of war exists with Turkey" on account of hostile acts by Turkish forces under German officers. I find no record of an actual alliance between Turkey and Germany, though very likely there is one. But we do know that Turkish military operations for more than two years have been directed by German policy under German command to such a degree that Turkish forces have coöperated with Germany upon all her battle lines except the Western one. This is alliance whether formally agreed to or not. Turkey's case then is not essentially different from Austria's, and we may fairly be governed in our relations with her by the facts as they develop, prohibiting trade with her meanwhile.

With Bulgaria we are still less likely to come into contact and to be forced to define relations.

If and when United States troops confront the soldiers of Germany's allies on some theater of war, it will be needful to recognize a state of war between their respective governments, in order to know the conditions, laid down by treaty, Hague Convention or by the general principles of law, under which they shall engage. Until then, there are only the less pressing problems involved in a state of war, questions of trade, of partnership, of contract and so on, which need solution. These at present, owing to the stringent blockade of the coasts of our enemy's allies and to the hostile encirclement of their territories, may not become practical questions at all.

But if our State Department were asked today if war existed with Austria or with Turkey, it would probably say No, and be justified in its answer.

T. S. WOOLSEY.

THE CHENGCHIA TUN AGREEMENT [1]

The town of Chengchia Tun is situated some 53 miles northwest of Ssupingkai, which is a station on the South Manchuria Railway. Ssupingkai is about one hundred miles north of Mukden and is to be the junction of a branch railway line to be built through Chengchia Tun to Taonan Fu, a concession for which was granted to Japan in October, 1913. Taonan Fu and Chengchia Tun are situated in a region which until a few years ago was included in Eastern Inner Mongolia, but is now incorporated in the Province of Shengking, the southernmost province of Manchuria.

It is stated that Japanese troops had been stationed in Chengchia Tun for two years when the trouble broke out. The Chinese Government had protested against their presence there and they do not appear to have had the right to be there, since the town is fifty-three miles from the nearest station of the Japanese Railway Zone.

As a result of the Russo-Japanese War, the Japanese fell heir to the privileges previously enjoyed by Russians in South Manchuria. Among these were the possession of the leased territory of the Kwantung Peninsula and the control of the South Manchuria Railway.

The first grant made by China to Russians of a right to construct and operate a railway in Manchuria was that of 1896 for the Chinese Eastern Railway accorded to the Russo-Chinese Bank. This bank was nominally owned by Chinese and Russians, but as a matter of fact it was wholly controlled by Russians and in close relationship with the Russian Government. The agreement as to the Chinese Eastern Railway provided that China and Russia were to establish a railway company. The seal was to be issued by the Chinese Government and the Director General to be appointed by China. But the company in reality was almost wholly Russian and controlled by Russia.

Article V of the agreement stipulated that the Chinese Government should take measures for the protection of the railway line. When, therefore, the company's statutes were issued the paragraph dealing with this subject read as follows:

> 8. The Chinese Government has undertaken to adopt measures for securing the safety of the railway and of all employed on it against any extraneous attacks. The preservation of law and order on the lands assigned to the railway and its

[1] Printed in Supplement to this JOURNAL, p. 112.

appurtenances shall be confided to police agents appointed by the company. The company shall for this purpose draw up and establish police regulations.

Under this provision one would naturally expect a Chinese police force to be established for the protection of the railway, but the company being in reality Russian, a force of Russian railway guards was organized and stationed along the line to function within a limited region along the railway known as the Railway Zone.

After the convention of June 24, 1898, had secured permission to build a branch line from the Chinese Eastern Railway to Port Arthur and Dalny, the same policy was adopted for the protection of that line. By the Treaty of Portsmouth, the South Manchuria Railway from Kuangchengtzu to Port Arthur and Dalny passed into the possession of Japan, and in the treaty with Japan of December 22, 1905, China gave consent to the transfer. On the same day China and Japan entered into another agreement of which Article II stipulates that:

in view of the earnest desire expressed by the Imperial Chinese Government to have the Japanese and Russian troops and *railway guards* in Manchuria withdrawn as soon as possible, the Imperial Japanese Government, in the event of Russia agreeing to the withdrawal of her railway guards or in case other proper measures are agreed to between China and Russia, consent to take similar steps accordingly. When tranquillity shall have been reëstablished in Manchuria and China shall have become herself capable of affording full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia.

These conditions do not appear to have been fulfilled, and consequently no diminution has taken place in the number of the railway guards.

By the agreement from which quotation was just made sixteen towns were added to those in Manchuria already opened to foreign residence and trade.

Immediately after taking over control of the South Manchuria Railway, Japan incorporated the South Manchuria Railway Joint Stock Company and established a government for the leased territory of Kwantung, whose Governor General was given authority to protect the South Manchuria Railway and supervise the affairs of the railway company. Among other provisions, the Imperial Ordinance contained the following:

Article 10. When the Governor General deems it necessary for the maintenance of the welfare and order of the territory under his jurisdiction or for the protection or supervision of the railway lines, he may employ military force.

It was further provided that consular officers in South Manchuria might be appointed Secretaries of the Government-General and that such consular officers should take charge of police affairs along the railway lines.

Some modification of this arrangement has since been made, but the important fact to be borne in mind is that there thus gradually grew up in South Manchuria an exercise of police authority in the railway zone by Japanese consular authorities.

It is well known that Japanese as well as other foreign consuls in China exercise extraterritorial jurisdiction over their own nationals, and in the exercise of this authority foreign consulates must be provided with constables or marshals authorized to make arrests and with officers to serve as judges of the consular courts. In some foreign settlements, therefore, such as Shanghai, where police powers have not been expressly reserved by China, local municipal governments have been established by the foreign residents and foreign police employed to preserve order. Such police exercise jurisdiction not only over the foreign residents, but also over Chinese living in the settlements.

After Japanese consuls had exercised police powers in the railway zone of the South Manchuria Railway without protest, their jurisdiction began to extend beyond the zone. Arrests were made even within the walled city of Mukden, and wherever Japanese consuls were stationed, even in places where no Japanese settlement existed, Japanese police also were apt to be found, with the result that altercations between Chinese citizens and Japanese police became of somewhat frequent occurrence.

When in May, 1915, Japan and China signed a treaty respecting South Manchuria and Eastern Inner Mongolia, Japanese subjects were granted the right to reside, travel and engage in business in those regions, but it was expressly stipulated that such Japanese subjects should be required to have passports, register with the local authorities and submit to Chinese police laws and ordinances and to the taxation of China.

Notwithstanding the treaty, Japanese police forces continued to enlarge the field of their operations. The force at Chengchia Tun remained in spite of Chinese protests. Some excuse perhaps may be found in the disturbed condition of the region, infested as it was by Mongol bandits. Another excuse may be found in the fact that the survey of the proposed railway branch line was begun last summer,

and if a railway line may be policed why not a party of railway surveyors in a prospective railway zone?

The quarrel which very easily occurred under these circumstances in Chengchia Tun led to certain demands by the Japanese Government. Following the precedent set in the case of the twenty-one demands presented to China in 1915, a portion of the demands made in relation to Chengchia Tun were put down as *desiderata*.

There were four demands as follows:

1. Punishment of the general commanding the 28th Division.
2. The dismissal of the officers at Chenchiatun responsible for the occurrence, as well as the severe punishment of those who took direct part in the fracas.
3. Proclamation to be posted ordering all Chinese soldiers and civilians in South Manchuria and Eastern Inner Mongolia to refrain from any act calculated to provoke a breach of the peace with Japanese soldiers or civilians.
4. China to agree to the stationing of Japanese police officers in places in South Manchuria and Eastern Inner Mongolia where their presence was considered necessary for the protection of Japanese subjects. China also to agree to the engagement by the officials of South Manchuria of Japanese police advisers.

The *desiderata* were also four:

1. Chinese troops stationed in South Manchuria and Eastern Inner Mongolia to employ a certain number of Japanese military officers as advisers.
2. Chinese military cadet schools to employ a certain number of Japanese military officers as instructors.
3. The Military Government of Mukden to proceed personally to Port Arthur to the Japanese Military Government of Kwantung to apologize for the occurrence and to tender similar personal apologies to the Japanese Consul General in Mukden.
4. Adequate compensation to be paid by China to the Japanese sufferers and to the families of those killed.

In the final settlement, as will be seen, the first three demands were granted in substance; reproval was substituted for punishment in the case of the general commanding the 28th Division, and the officers instead of being dismissed and severely punished, were to be punished according to law, and only severely punished if the law so provided.

The fourth demand was rejected by China and withdrawn by Japan. The first two of the *desiderata* were refused by China and withdrawn by Japan. Instead of requiring the Military Governor of Mukden to proceed to Port Arthur in person and apologize for the occurrence, as expressed in the third of the *desiderata*, it was agreed that he might send a representative to express his regret.

As for the fourth of the *desiderata*, a solatium was allowed to one Japanese only. An important item of the agreement is that stipulating that the Japanese soldiers in the district should be withdrawn.

The withdrawal of the obnoxious demands reflects credit upon the Japanese Government as evidencing an unwillingness to enforce exorbitant demands of an unjust character, and the agreement to withdraw the troops shows a desire to remove the root of the difficulty and to respect the sovereignty of China.

JAMES BROWN SCOTT.

THE ROLE PLAYED BY THE STATE DUMA IN THE FORMATION OF THE NEW RUSSIA [1]

The first State Duma was called on April 27, 1906. Hundreds of thousands of people gathered on the streets of the capital to greet the representatives of the people. At this solemn moment in Russia's history, the representatives of the country gathered for the first time in the Winter Palace to meet the Czar. In the foreground vivid court uniforms, and in the background modest black coats, stood out strikingly. The deputies awaited the speech of the Czar, standing ready to meet him. The Czar spoke. It was a speech replete with reticence and noteworthy for its omissions, and the answer of these modestly-dressed people was their silence. "The silence of people is a lesson for kings," said Mirabeau at the end of the eighteenth century. But the lesson availed not this time.

Despite the fact that sentiment throughout the country was in favor of the first State Duma, the Duma was dismissed seventy-two days after its calling, by order of the monarch. A reëlection was ordered by the Czar's decree in the hope of securing more conservative deputies. But the results of the election did not justify the expectations of the conservative element in Russia, for the second Duma was even more radical than the first. Then, on the initiative of the Prime Minister, P. A. Stolypin, the government availed itself of a privilege to which it no longer had any right, in accordance with the laws it had itself enacted. On June 3, 1907, the Czar issued a new decree, by which the franchise was granted almost exclusively to the most conservative classes — the nobility and clergy. And although public opinion was

[1] This note kindly contributed by Dr. B. E. Shatsky, of the University of Petrograd.

deeply incensed at this change, the physical power of the government insured order, and the new elections to the Duma were made in accordance with the newly issued decree.

As a result, the majority of the third State Duma proved to be of the extremely moderate Octobrists, led by the recently-resigned Secretary of War, A. I. Gouchkoff. They stood ready to lend all help to the government, fully believing in the government's readiness to live up to the reforms promised in the Manifesto of October 17, 1905. This alliance between A. I. Gouchkoff and P. A. Stolypin lasted for quite a time, until the Octobrists were finally convinced that the government intended least of all to carry into effect those reforms promised in the Manifesto of October. From that hour, the Octobrists (who also constituted the majority in the fourth Duma) began their gradual though slow transition from the support of the government to its open censure.

The war came. Not only the Octobrists, but all other parties as well, in vigorous patriotic impulse, forgot all their dissatisfaction and were ready to stand behind the Czar in the strife with the alien enemy. This impulse was neither understood nor appreciated. The same inefficient and partly criminal element was left at the head of the government. When the Russian army for lack of ammunition began its retreat under the destructive fire of the enemy, a group of social leaders visited that "good-hearted old man," the Prime Minister, J. L. Goremykin. The latter thus began the conversation: "I don't understand it; why are you so excited?" And this, at the time when England and France had already organized Coalition Cabinets where the brain and the strength of the people were represented!

During this period the State Duma was either not called at all, or called for but very short sessions. In the meantime, the fall of the governmental organization was daily becoming more imminent. Under these circumstances, even the most moderate Octobrists in the Lower Chamber of the State Duma, and even the conservative elements in the Imperial Council (more than half were members appointed by the Czar himself), realized the necessity of abolishing the abominable system which made it possible for a corrupt individual like Suchomlinoff to occupy the post of Minister.

It was under such circumstances, in 1915, that the idea was formulated of creating a progressive faction of members of both legislative chambers. Those approving of this idea held their first session at the

house of the late Maxim Kovalevsky, one of Russia's most prominent historians. At this session, P. Miliukoff outlined for the Assembly a long list of liberal reforms. The conservative element, however, was so strong in this Assembly that even a favorable solution of the Jewish question met with some opposition. "We are well aware" they said, "of the injustice of the Jewish oppression, but it will be almost impossible to convince our common people, not all of whom are sufficiently educated." However, due to the energy of Prof. Miliukoff, all these conflicting elements were united on a moderately liberal program.

The answer to this action was the dismissal of the Duma and the Council and the withdrawal of permission of the congresses of Zemstvos and Municipalities in Moscow to assemble. The government now reached its last stage. At the head of the government there appeared men known not only to be reactionary, but actually suspected of treachery. The climax was reached when Sturmer was appointed to the double post of Prime Minister and Minister of Foreign Affairs. The President of the Duma, M. V. Rodzianko, wrote to the Czar, explaining to him the disastrous effect the appointment of Sturmer, a man of German descent and sympathies, would have on the public opinion of the country. This letter, however, was never answered.

The moment it became evident that it was Sturmer's intention to find out the lay of the land in order to achieve a separate peace with Germany, all parties, including the liberal, moderate, and the most conservative elements in Russia, united in opposition. Pointed speeches against the government were delivered, not only by P. N. Miliukoff, but also by B. M. Purichkevitch, a member of the reactionary union of the Russian people and even by members of the Imperial Council.

Under the pressure of agitation, the government was forced to yield. Sturmer was dismissed. His place as the President of the Council of Ministers was taken by A. F. Trepoff, a conservative, who had the reputation of being entirely devoted to the interests of Russia. But within thirty days Trepoff was compelled to resign and to his place was appointed Prince Golizin, a conservative of no distinct policies.

The Minister of Interior, Protopopoff, a malignant maniac who was incurring the hatred of the whole country, remained the ruling spirit of the government. At a meeting of political leaders at which Protopopoff was present, Deputy A. I. Shingareff, the present Secretary of Agriculture, concluded his speech to Protopopoff with the words: "Go to bed and lie down. Calm yourself, you are ill." Shingareff's

words were very soon understood by all Russia, for it was clear to everybody that the guidance of Russia in its most critical period of life had been put into the hands of an insane man.

Some members of the government felt the impossibility of being associated with Protopopoff, but the Czar prevailed upon them, against their wishes, to retain their places. Thus, all Russia was united in the conviction that it was impossible to leave the control of affairs any longer in the same hands, and that Russia's only hope lay in the Duma.

On February 14, 1917, the Duma was called for a new session. By this time it had the approval of the Imperial Council, some of the Ministers and seventeen members of the Imperial family. Again words of warning and rage addressed to the government rang out in the State Duma. The answer to these clamors was an order proroguing the Duma. But this time the Duma refused to abide by the Imperial orders. N. V. Rodzianko, at the head of the Executive Committee of the Duma, sent out information to all parts of the country declaring the existence of the new order of things. The Czar, realizing the situation when it was too late, signed the Act of Abdication in favor of Grand Duke Michael. The latter declined to accept the throne, and left all power to the Provisional Government appointed by the Executive Committee of the Duma. The Acts of Abdication of Czar Nicholas and Grand Duke Michael were brought by the Secretary of Justice, A. F. Kerensky, to the Senate. These were published by the Senate without question and were placed in safe custody to be kept as historic documents of utmost importance. From this moment a new era began for Russia.

IN MEMORIAM

JOSEPH H. CHOATE

On May 14, 1917, the Honorable Joseph H. Choate suddenly died, in the full possession of his great and splendid powers and in the performance of his civic duties. Born in Salem, Massachusetts, on January 24, 1832, he had rounded out more than the full three score years and ten, without losing interest in life and without finding the years weighing heavily upon him. By birth and ancestry he was of Massachusetts and he added distinction to the Commonwealth. By residence

he was a citizen of New York and greatly added to the distinction of the State of his adoption. He was, above all things, an American, and reflected credit upon the country, both as a citizen and as an Ambassador to Great Britain. Later, at the Second Hague Peace Conference, as Chairman of the American delegation, he upheld American ideals with a grace, a dignity, and a persuasiveness which gave him an international standing which time can only preserve.

It is stated that Mr. Choate was, at the time of his death, engaged in the performance of his civic duties. From the outbreak of the war of 1914 he felt very keenly that the United States should not only manifest sympathy for the Allied cause, but that the United States should exert force, if necessary, in order to maintain its rights against the unlawful attacks of the Imperial German Government, and that the United States should, in view of all the circumstances, unite itself with the Allies in defense not merely of the freedom of the seas but of the liberty of the world. He welcomed President Wilson's appeal to Congress and the declaration of the existence of a state of war by that body against the Imperial German Government. The events of the past two years and more had drawn him largely from the retirement to which his years and his labors had justly entitled him. He spoke from the platform in favor of preparedness, he lent the weight and dignity of his name to organizations calculated to advance the cause of preparedness. He welcomed, as New York's most distinguished citizen, the British Commission to the City of New York, and on the very morrow of the day on which he died he was to have addressed the students at Columbia University on the war and as to the duties which they should perform.

It was not the first time that Mr. Choate had welcomed distinguished visitors to the city of his adoption; and it seems almost beyond the span of a single life, and it shows how early Mr. Choate achieved distinction, when it is recalled that in 1860 he was chairman of that meeting at Cooper Hall where Abraham Lincoln, soon to be nominated for the Presidency, first spoke to his fellow countrymen in the East. A leader of the bar, as long as he cared to lead it, Chairman of the Convention of 1894 which revised the Constitution of the State of New York, Mr. Choate held, as it were, his position in trust to the cause of justice and his leisure at the disposal of every good cause. He took a citizen's interest in public questions and served his country when called upon without forcing himself upon his countrymen. Americans

were proud of, and Englishmen will long remember, his services as Ambassador to Great Britain, where his handsome person, his magnificent presence, his charm of speech as well as of manner, his unaffected and sparkling wit, endeared him in public and private, not only to the members of his profession — who honored him, as never an American before, by electing him a bencher of Lincoln Inn — not only to the statesmen of England with whom he came into official contact, but also to the people of England, to whom he represented the intelligence of the United States.

Greater could no man be than Mr. Choate at The Hague, and in no sphere and on no occasion did his great and splendid talents display themselves to greater advantage. He read but he did not speak French, and the eye was more accustomed to it than the ear. Nevertheless he followed the proceedings of the Conference; a few slight suggestions as to the course of the proceedings enabled him to grasp them in detail, so that, although he spoke frequently and on the spur of the moment and entered into details, he never misunderstood or misstated an address to which he replied in English. The addresses which he himself delivered during the Conference are models of public speech, strong yet graceful, dominant yet persuasive. There is nothing finer in the Conference than the following pointed reference to Baron Marschall von Bieberstein, the first German Delegate, who professed his love for arbitration in private but flouted it in public.

> I should like to say a few words in reply to the important discourse delivered by the First Delegate of Germany, with all the deference and regard to which he is justly entitled because of the mighty empire that he represents, as well as for his own great merits and his unfailing personal devotion to the consideration of the importans subjects that have arisen before the conference. But with all this deference it seems to me that either there are, in this conference, two First Delegates of Germany, or, if it be only the one whom we have learned to recognize and honor, he speaks with two different voices. Baron Marschall is an ardent admirer of the abstract principle of arbitration and even of obligatory arbitration, and even of general arbitration between those whom he chooses to act with, but when it comes to putting this idea into concrete form and practical effect he appears as our most formidable adversary. He appears like one who worships a divine image in the sky, but when it touches the earth it loses all charm for him. He sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her.

Mr. Choate came into the world bearing a great name, to which he added dignity, luster, and affectionate regard. Like his kinsman,

Rufus Choate, he was an advocate, and always an advocate, of great, good, and worthy causes. He rarely held office, but he lived and died a public servant.

RICHARD OLNEY

The American Society of International Law lost in the death, on April 8, 1917, of the Honorable Richard Olney, as in the case of Mr. Choate, a Vice-President and an interested member from the date of its foundation. Like Mr. Choate, he was born in Massachusetts (September 15, 1835) and added great distinction to the State of his birth, but, unlike Mr. Choate, he was willing to be the first citizen of his Commonwealth and to lead the bar of his native State, instead of wandering to New York to become the first citizen of New York and the leader of its bar. Like Mr. Choate, he was preëminently a great citizen; again like Mr. Choate, he rarely held a public office, but as Attorney General of the United States he won the confidence and admiration of his countrymen by the bold and unhesitating way in which he advised President Cleveland as to his rights and as to his duty in calling out the army to protect the federal mails in Chicago, and as Secretary of State he won the admiration of his countrymen by his uncompromising attitude in the Venezuelan question, which caused Great Britain to submit that dispute to arbitration — and it is not too much to say that there never was and there could not well be a more efficient Secretary of State than Richard Olney.

Mr. Olney was great in himself and derived and owed nothing to his surroundings. He was a member of the bar, yet hardly of the bar, for he practiced law, as one might say, from the outside. He did not associate on intimate terms with his professional brethren; he rather dwelt apart — entered the court-house as one intent upon business, and did not linger when the work was done. He did not build up a large firm of which he was the head and whose numerous members acted in accordance with his slightest suggestion. His law firm consisted of Richard Olney, the brain of this firm was Richard Olney, and there was hardly a book, bound in sheep or calfskin, to suggest that Richard Olney needed aid of other men. Quiet, reserved, dignified, sparing of speech, firm in his views, dominated by the strength of his character and by the force of his intellect, he did not charm, he did not

persuade; and yet he could be charming and persuasive on occasion. He compelled attention, and there could be but one master in his presence. The Honorable John W. Foster said all in a single phrase when following him at the first meeting of the American Society of International Law: "What shall the man say who comes after the king?"

JAMES BROWN SCOTT.

THE KRONPRINZESSIN CECILIE AND THE HAGUE CONVENTION VI

The decision in the case of the *Kronprinzessin Cecilie* given by the Supreme Court of the United States on May 7, 1917, may properly call to mind the work of the Hague Conference in 1907. At this Second Conference at The Hague in 1907, the American delegates endeavored to secure by international agreement immunity from capture for merchant vessels at sea on the outbreak of hostilities.

The Conference drew up Convention VI relative to the status of enemy merchant vessels at the outbreak of war. The delegates of the United States, however, did not sign, and the Government of the United States has not ratified this convention. The report of the delegates says of the convention:

> At the first reading, the convention seems to confer a privilege upon enemy ships at the outbreak of war. Free entry and departure are provided for, ships are not to be molested on their return voyages, and a general immunity from capture is granted to vessels from their last port of departure, whether hostile or neutral. But all these immunities are conditioned upon ignorance of the existence of hostilities on the part of the ship. This condition forms no part of the existing practice, and it was the opinion of the delegation that it substantially neutralized the apparent benefits of the treaty and puts merchant shipping in a much less favorable situation than is accorded to it by international practice of the last fifty years. * * *
>
> As the freight trade of the world is carried on in steamers which habitually carry only enough coal to reach their destination, the operation of the treaty is to render them instantly liable to capture, the alternative being to continue to the hostile destination and surrender. * * *
>
> The effects upon the practice of marine insurance are also important. The ordinary contract does not cover a war risk. The operation of a war risk is simple because its conditions and incidents are fully known. But a policy calculated to cover the contingency of capture, the risk depending upon the chance or possibility of notification, would introduce an element of uncertainty into marine risks which, in view of the interests at stake, should not be encouraged.

The eventualities for which the American delegates endeavored to provide are in part illustrated in the case of the *Kronprinzessin Cecilie*.

This vessel sailed from New York for Bremerhaven via Plymouth on July 28, 1914. She carried among other cargo 93 kegs of gold valued at nearly $5,000,000. The prepaid freight on this gold was $9,268. On July 31st, when more than 1000 miles from Plymouth, she turned back and later entered Bar Harbor. Here on August 8th, the shippers, the Guaranty Trust Company of New York, accepted redelivery.

The vessel had turned back on receipt of a code message from the directors: "War has broken out with England, France and Russia. Turn back to New York."

On account of the failure to deliver the 93 kegs of gold, the shippers libeled the vessel, claiming damages of more than one and three quarters million dollars. In the Massachusetts District Court the libel was dismissed "for the reason that the master was justified in his action by the duty imposed upon him under the maritime law." Other cases against the *Kronprinzessin Cecilie* were similarly dismissed. 238 Fed. Rep. 946 (Feb. 1, 1916).

In the Circuit Court of Appeals on November 17, 1916, the decision of the District Court as to the shipment of gold was reversed (Putnam, J., dissenting).

The Supreme Court handed down its opinion on the case brought before it on writ of certiorari on May 7, 1917. Mr. Justice Holmes delivered the opinion of the court, Mr. Justice Pitney and Mr. Justice Clarke dissenting. The question considered was whether the turning back was justified by facts, even though the *Kronprinzessin Cecilie* might possibly have reached her destination had she continued her voyage. The court said:

> But if it be true that the Master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the Master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the Master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the Master is not to be put in the wrong by nice

> calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

The decree of the Circuit Court of Appeals was accordingly reversed.

The doctrine advocated by the United States at the Second Hague Conference in 1907 was that days of grace for enemy merchant vessels should be obligatory. The Conference agreed to a convention expressing the opinion that it was "desirable" that days of grace be allowed for the departure of enemy merchant vessels in port at the outbreak of war, or for enemy merchant vessels which had sailed before the war and entered an enemy port or were met at sea "while still ignorant that hostilities had broken out."

The aim of this convention was shown in the declaration that the forty-four states, in the language of the preamble, were

> Anxious to insure the security of international commerce against the surprises of war, and wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities.

The Supreme Court in its decision as to the carriage of the gold said "neither party to the contract thought that it would not be performed." It would have been, therefore, an operation, in the words of the Hague Convention, "undertaken in good faith and in the process of being carried out before the outbreak of hostilities."

Further, it may be said that Great Britain and Germany had mutually proposed allowance of certain days of grace for merchant vessels of each in the ports of the other at the outbreak of war. No agreement was reached, owing apparently to misunderstanding rather than to intention. France and Germany, France and Austria, and Great Britain and Austria did, however, allow days of grace.

It is true that Italy, Servia, Turkey, and other states now belligerents did not ratify Hague Convention VI, and that Germany and Russia ratified with reservations. It is also possible that the *Kronprinzessin Cecilie* may not have been entitled to exemptions because by Article 5 of Convention VI "The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war-ships." If not liable under this Article 5, the other Articles of Convention VI would seem to justify the attitude of the Government of the United States in 1907, and the opinion of the

Supreme Court in 1917, that under the existing international agreements and practice the captain of the *Kronprinzessin Cecilie*, in the words of the court, "acted as a prudent man."

GEORGE GRAFTON WILSON.

LESTER H. WOOLSEY, THE NEW SOLICITOR FOR THE DEPARTMENT OF STATE

On June 27, 1917, Lester H. Woolsey, Esquire, of New York, was appointed Solicitor for the Department of State. His name had previously been sent to the Senate for confirmation and the Senate has duly confirmed the appointment. Mr. Woolsey has entered upon the performance of the duties of the office and it is to be hoped that he will long continue to perform these duties, not merely in his own behalf, but in the interest of the Government, of which he is a faithful and competent, upright and loyal servant.

The duties of the Solicitor are technical. They require a broad knowledge of international law, not merely as found in the books, but in the actual and shifting practice of nations. The Solicitor must be versed in diplomacy, for the questions arise for the most part in diplomatic intercourse. They must be considered in the light of diplomacy; they must be determined with a full knowledge of the aims and purposes of governments, for a suggestion proper enough in theory is often unacceptable or unworkable in practice, and tact as well as law often determines the method and solution. Experience and temperament, judgment and learning, are indispensable for the successful performance of the duties of this office.

Mr. Woolsey possesses these qualities in abundant measure and his appointment is because of their possession, not because of influence in his behalf. He entered the Department of State almost ten years ago as a clerk in the Solicitor's Office, of which he is now the head. He learned at first hand its duties and performed them with skill and devotion. He was appointed Assistant Solicitor in 1913. He was appointed Law Adviser to the Department of State on July 1, 1916, an office especially created for him by Secretary Lansing, and since the outbreak of the European War he has, by his skill and devotion, amply justified the confidence of his chief — to such a degree, indeed, that the Secretary recommended his appointment as Solicitor to the Attorney General, who makes the appointment. In fact, the Solicitor

is an officer of the Department of Justice, though not in name an Assistant Attorney General.

Mr. Woolsey is, as the members of the Society and as the readers of this JOURNAL know, a member and a contributor to the JOURNAL. He has contributed to its columns two admirable papers, one in 1909 on "Early Cases on the Doctrine of Continuous Voyage" — a doctrine with which he was thus fortunately familiar during the European War — and another in 1910 entitled "A Comparative Study of the South African Constitution." Recently he delivered a notable address on "Economic Considerations of International Organization" before the Eleventh Annual Meeting of the Society, which, when it appears in the volume of the proceedings of the Society for 1917, will be regarded as possessing permanent value.

The opportunities of service were never greater than at the present time. The complicated questions of neutrality have given way to the complicated questions of war, and it is a matter of congratulation that the law officer of the Department of State is by natural ability, training, and experience as well fitted to cope with the one as with the other.

JAMES BROWN SCOTT.

THE ANNUAL MEETING OF THE SOCIETY

The Eleventh Annual Meeting of the Society was held in Washington, April 26 to 28 last. The meeting was opened on the evening of the 26th, in the New Willard Hotel, by the Honorable Elihu Root, President of the Society, who, although when he selected the subject of his presidential address several weeks prior to the meeting, he had no idea that he would soon be called upon to head the American mission to the new-born democracy of Russia, delivered a stirring address upon "The Effect of Democracy on International Law." It was a peculiar privilege of the members of the Society that to them Mr. Root made his last public utterance before leaving the United States to stir the Russian peoples and armies to renewed action in defense of democracy and the supremacy of law among nations. The theme of his address, the thought that he left with his fellow-members in the Society, the message that he took with him to the masses of new Russia struggling for liberty against autocracy both within and without their country, was contained in the following concluding passages:

The world cannot be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise. If it is all Prussian, there can be no real international law. If it is all democratic, international law, honored and observed, may well be expected as a natural development of the principles which make democratic self-government possible.

The democracies of the world are gathered about the last stronghold of autocracy, and engaged in the conflict thrust upon them by dynastic policy pursuing the ambition of rulers under claim of divine right for their own aggrandizement, their own glory, without regard to law or justice, or faith. The issue today and tomorrow may seem uncertain, but the end is not uncertain. No one knows how soon the end will come, or what dreadful suffering and sacrifice may stand between; but the progress of the great world movement that has doomed autocracy cannot be turned back, or defeated.

That is the great peace movement.

There the millions who have learned under freedom to hope and aspire for better things are paying the price that the peaceful peoples of the earth may live in security under the protection of law based upon all embracing justice and supreme in the community of nations.

The presidential address was followed by two papers on "The Status of Armed Merchantmen," the first by the Honorable Chandler P. Anderson, formerly Counselor to the Department of State, and the second by Mr. Ellery C. Stowell, Associate Professor of International Law in Columbia University in the City of New York. The subject was informally discussed by Mr. Maurice Leon, of the New York Bar. A pleasing feature of the opening session was the receipt of cabled greetings and best wishes from Mr. Antonio S. de Bustamante, President of the Cuban Society of International Law. An appropriate acknowledgment was sent by the Society on the following day.

On Friday morning, April 27th, the Society considered the question of "Attacks upon Enemy Merchant Vessels." The subject was opened with a paper by Mr. Charles Cheney Hyde, of the Chicago Bar, Professor of International Law in Northwestern University. It was informally discussed by Mr. Everett P. Wheeler, of the New York Bar. This was followed by a consideration of "Some Economic Aspects of International Organization." Mr. Lester H. Woolsey, the newly appointed Solicitor for the Department of State, led this subject with a prepared paper, and was followed by informal remarks from Professor Philip Marshall Brown, of Princeton University, Rear Admiral Colby M. Chester of the U. S. Navy, Mr. Charles Noble Gregory, of the Bar of the District of Columbia, Mr. Denys P. Myers, of the World Peace Foundation, Boston, Mass., Professor George G. Wilson, Pro-

fessor of International Law in Harvard University, Mr. Walter S. Penfield, of the Bar of the District of Columbia, Mr. James Brown Scott, Special Adviser to the Department of State, Mr. Bernard C. Steiner, of Baltimore, Md., and Mr. Charles S. Brand, of the New York Bar. At this session, the Society unaminously adopted the following resolution, upon motion of Mr. Sterling E. Edmunds, of the St. Louis Bar:

> Whereas, the legal training of those of our citizens in military and international law is peculiarly necessary in this war, which is essentially one for the vindication of law; and,
>
> Whereas, the usual educational facilities of the Government of the United States may not be adequate to so large an added task; therefore, be it
>
> Resolved, that the American Society of International Law offers to the Government of the United States the services of its members as instructors in such branches of law in any manner in which their services may be desired.

In the afternoon of the same day, the question of international organization was further discussed. Mr. Raleigh C. Minor, Professor of International Law in the University of Virginia, delivered an address on the legislative aspects of the subject, and Mr. Charles G. Fenwick, Associate Professor of Political Science in Bryn Mawr College, read a paper on judicial international organization. In the informal discussions of these subjects which followed, the following members took part: Senator Henri LaFontaine, of Belgium, Mr. Theodore P. Ion, of Washington, D. C., Mr. Denys P. Myers, of Boston, Mass., Dr. David Jayne Hill, of Washington, D. C., Mr. Arthur G. Hays, of New York City, Mr. Justice Russell, of the Supreme Court of Nova Scotia, Rear Admiral Colby M. Chester, U. S. Navy, Mr. Edward C. Eliot, of St. Louis, Mo., and Mr. James Brown Scott, of Washington, D. C.

The consideration of the question of International Organization was continued at the evening session of the same day. The executive and administrative features of such organization were discussed in papers presented by Mr. William C. Dennis, of the Bar of the District of Columbia, and Mr. James Brown Scott, Director of the Division of International Law of the Carnegie Endowment for International Peace. After an address by Dr. Alejandro Alvarez, of Chile, Secretary General of the American Institute of International Law, upon "America and the Future Society of Nations," the previous question of executive and administrative international organization was discussed from the floor by Mr. Chester DeWitt Pugsley, of New York, Mr. Theodore P. Ion,

Mr. Soterios Nicholson, of Washington, D. C., Mr. Arthur G. Hays, Senator Henri LaFontaine, and Professor Stanley K. Hornbeck, of the University of Wisconsin.

The session on Saturday morning, April 28th, was opened with an address by Senator Henri LaFontaine, of Belgium, upon the subject of "The Neutralization of States in the Scheme of International Organization." This was followed by a paper on the same subject by Mr. Cyrus F. Wicker, of the New York Bar, formerly of the American diplomatic service. The subject was then thrown open for discussion from the floor, and the following members took part: Dr. David Jayne Hill, Mr. Theodore P. Ion, Senator LaFontaine, Mr. Denys P. Myers, Mr. Nelson Gammans, of the New York Bar, Rear Admiral Colby M. Chester, and Mr. Theodore N. Van Derlyn, of Switzerland.

At the business meeting which followed the discussion Saturday morning, the Society reëlected the president, vice-presidents, and retiring members of the Executive Council. To fill the vacancy in the vice-presidents caused by the death of the Hon. Richard Olney, Hon. Simeon E. Baldwin was elected. The Honorable James L. Slayden was elected to fill a vacancy in the Executive Council. The Committee on the Study and Teaching of International Law and Related Subjects made a final report and was, upon request, discharged. The Committee on the Codification of International Law had been continued by vote of the Society on Friday evening. A resolution expressing its great sense of loss in the death of the Honorable Richard Olney, a member and Vice-President of the Society since its foundation, was unanimously adopted.

The Executive Council met immediately upon the adjournment of the Society, and reëlected the Chairman of the Council, the members of the Executive Committee, the Treasurer, the Recording and Corresponding Secretaries, and the Assistant to the Secretaries. The Board of Editors of the American Journal of International Law was likewise continued without change. The Council also continued the membership of the Standing Committee on Selection of Honorary Members, which made no recommendation for the present year, and the Standing Committee on Increase of Membership, except the chairman of the latter, — Mr. Scott having requested that he be allowed to withdraw, and Mr. Oscar S. Straus was appointed in his place. The Committee on the Annual Meeting was likewise continued, with one change, namely, Mr. George G. Wilson withdrew and Mr. Breckinridge Long,

Assistant Secretary of State, was elected. The Committee on Publication of Proceedings was discontinued and these duties assigned to the Editor-in-Chief and Secretary of the Board of Editors of the JOURNAL.

The meeting closed with the annual banquet at the New Willard Hotel on the evening of the 28th. Eighty-five members and guests were present. In the absence of President Root, who had left the city to prepare for his important public errand to Russia, the Honorable David Jayne Hill presided as toastmaster. In his remarks opening the speaking of the evening, Dr. Hill took occasion to reply to those who assert that international law has been destroyed. In answer to this statement he remarked:

> International law can never be destroyed; it may be violated; its rules may be disobeyed, but so may the rules laid down by municipal law, or by any legal system; but the law is there, and, so far as it goes, so far as it is the expression of that justice toward which all law aspires, it is a reality, in spite of violations. There is an analogy which has often impressed me, between the jurist and the man of science, who is exploring the arcana of nature with the idea of discovering the truth. There is not a scientific text-book in the world ten years old that is fit to teach in school or college today; and so, when we find that our international law books are already uncertain and will have to be revised, this should not in the least shake our faith in the reality and the solidity of the law. The search for justice is, to the jurist, what the search for truth is to the physicist, the psychologist, and the historian. Let me say, with the strongest possible emphasis, gentlemen, that so long as the idea and the ideal of justice persists in the human mind — and it will never cease to persist — there will be international law.

The speakers were Mr. Justice Russell, of the Supreme Court of Nova Scotia, Hon. Oscar S. Straus, M. Frederic Allain, in charge of the legal department of the French Purchasing Commission in the United States, Hon. Sheldon Amos, Judge of the Egyptian Mixed Court, and Professor B. E. Shatsky, of the University of Petrograd.

The complete addresses delivered during the meeting and at the banquet, together with the discussions, will appear in the Proceedings now in press and shortly to be issued.

GEORGE A. FINCH.

JUDGE ADVOCATES IN THE ARMY

On June 15, 1917, the War Department announced the selection from civil life of twenty Judge Advocates, to serve with the first levy of approximately 600,000 men of the national draft army. It was stated that each of the Judge Advocates would be assigned to a division

of the Army and that all of them would be Majors on the staff of the Judge Advocate General in the field. Those appointed were:

Henry L. Stimson, ex-Secretary of War, who has been assigned to duty for the present at the Army War College; Professor Eugene Wambaugh and Professor Felix Frankfurter, both of the Law Faculty of Harvard; Dr. James Brown Scott, a leading authority on international law; Professor John H. Wigmore, Dean of Northwestern University; Gaspar G. Bacon, son of Robert Bacon, former Ambassador to France; Frederick Gilbert Bauer of Boston; George S. Wallace of Huntington, W. Va,; Nathan W. McChesney of Chicago; Lewis W. Call of Garrett, Md.; ex-Congressman Burnett M. Chiperfield of Chicago; Joseph Wheless of St. Louis; George P. Whitsett of Kansas City; Victor Eugene Ruehl of New York; Thomas R. Hamer of St. Anthony, Idaho; Johsua Reuben Clark, Jr., of Washington; Charles B. Warren of Detroit; Arthur C. Black of Kansas City; Edwin C. Davis of Boise, Idaho, and Hughe Bayne of New York.

The Committee on Public Information issued the following statement in connection with the announcement of the appointment of the Judge Advocates:

The men who have sought appointment have been so highly qualified — and many of them have been so distinguished in the law — that it has been hard at times to select a few from so much good material.

It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a "snap" or for a "silk stocking" position far in the rear of the actual fighting. The officers acting on the staff of the Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.

A great many distinguished lawyers and legal professors, men of national standing, applied to the Judge Advocate's Department early after the declaration of war and even before the President's final word was read. They were eager to act as soldier, lawyer, or to accept any post where there was a chance to offer themselves to their country. After a painstaking weeding out several Majors were created.

It is not the purpose of the present note to comment or to criticize the appointments, but rather to call attention to the fact that many of the appointees are members of the American Society of International Law and to express, on behalf of the Society, the satisfaction that its members are offering their services in the line of their profession for such use as the Government may care to make of them; and it may perhaps be proper to remark in this connection that the President of the United States is a regular, not an honorary, member of the Society,

that the Secretary of State is not only a member but a founder of the Society and an editor of its JOURNAL, and that the Judge Advocate General of the Army is likewise a member of the Society. It is peculiarly fitting that the persons appointed from civil life to Judge Advocates should be versed in international law, because, in our Army, the Judge Advocate General advises the War Department as to the laws of war, and the Judge Advocate of each division will be called upon to express his opinion as to the laws of war; for in the conception of the United States the laws and customs of war are not national but international.

JAMES BROWN SCOTT.

THE PORTO RICAN ASSOCIATION OF THE UNITED STATES OF AMERICA

Among the many societies of a quasi-international nature which are daily organized in this country, the Porto Rican Association of the United States of America, which has just been founded in Washington for the specific purpose of "fostering and stimulating in the United States of America, and especially in the capital city thereof, as the seat of the Government, a warm interest in Porto Rico, which may give rise to the establishment of closer bonds of friendship and culture between Porto Ricans and Americans and thereby tend to solve beneficially and definitively the legal and political status of the Island," has a claim to a friendly welcome and support by the American people.

In view of the present conditions in the world, and of the recent passage of the so-called Jones-Shafroth Act "to provide a civil government for Porto Rico," which was printed in the Supplement to this JOURNAL for April, 1917, p. 66, it becomes interesting to examine the present legal and political status of the island in order to ascertain with some sort of accuracy, what the real aims and purpose of this association are.

As it is well known, the island was ceded by Spain to the United States as a result of the Spanish American War, and Congress, after some hesitation as to the disposition which should be made of the island, passed the so-called Foraker Act as a temporary measure to provide a form of civil government for the island. When the question of the status of Porto Rico came up for decision by the Supreme Court in the so-called Insular Cases, it decided under this law by a divided court, that while Porto Rico was not a foreign country for international purposes, yet, in the constitutional sense it was no part of the United

States, but territory belonging and appurtenant thereto. As to the status of the inhabitants of the island, it was held that the Porto Ricans were not aliens within the meaning of the immigration laws, and although there is not a decision precisely in point upon the subject, it was taken for granted, by reason of the many *dicta* in the Insular Cases, that Porto Ricans were not citizens of the United States. As Congress, whether from neglect or legislative slowness, did not see fit further to legislate on this subject until the recent passage of the Jones-Shafroth Act, the island and its inhabitants went along courageously and hopefully laboring for over eighteen years under a law which, though wise as a temporary measure, was quite unjust and unsatisfactory for a number of reasons, among which were the very conditions which it had brought about regarding the status of the island and of the Porto Ricans.

The Jones-Shafroth Act has fixed the status of Porto Ricans by extending to them the privilege of citizenship. It also extends to the island a large measure of self-government, for which the Porto Ricans will, no doubt, show themselves to be fully prepared. But, so far as the status of the island is concerned, the new law leaves it in the same condition as before; that is to say, in the uncertain position of a piece of territorial property belonging and appurtenant to the United States. This is so probably because Congress is not quite sure as yet of the ultimate disposition to be made of the island.

The Porto Rican Association aims to fill this void in the relations between Porto Rico and the United States, and for this purpose it proposes to collect and distribute, judiciously and as far as possible, trustworthy information of all sorts concerning Porto Rico, which may be calculated to spread in this country a greater knowledge of the island and its inhabitants and dispel mutual errors and misconceptions. For this purpose, it will invite the coöperation of the Government of Porto Rico and the Bureau of Insular Affairs at Washington, and of all institutions, persons and corporations, whether Porto Rican or American, as may be best qualified to render valuable assistance to the association. It will also invite men of distinction in the various professions to lecture in this country upon selected Porto Rican topics of interest to the American people; publish a journal in English and Spanish as the official organ of the Association, and issue from time to time such publications as may be advisable or necessary fully to accomplish its aims. It hopes to open in Washington a Porto

Rican library of books, periodicals and other publications of a literary, scientific, historical and statistical interest relating to Porto Rico, as well as rooms for the exhibition of natural, industrial and artistic products of the island. The association will be extended throughout the United States by means of branch associations to be established in as many cities of the Union as possible, and it will take such other measures and establish and carry out as far as possible such other means and initiatives as may be deemed to contribute toward the success of its labors and the realization of its purposes.

This is an ambitious program on the part of the friends of Porto Rico in the United States, and notwithstanding its largeness and the difficulty of carrying it into effect, all citizens of the United States will wish it success, for the people of Porto Rico are our fellow-countrymen and our fellow-citizens, and whatever inures to the advantage of one section inures to the advantage of all; whatever helps the good people of Porto Rico by so much helps the citizens of the United States.

JAMES BROWN SCOTT.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives Diplomatiques, Paris; B., boletin, bulletin, bolletino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Cd.*, Great Britain, Parliamentary Papers; *Clunet*, J. de Dr. Int. Privé, Paris; *Current History* — Current History — A Monthly Magazine of the New York Times; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletín de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L.*, Law; M., Magazine; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Belgium, Moniteur belge; *Martens*, Nouveau recueil général de traités, Leipzig; *Q.* Quarterly *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

December, 1916.

12 ALBANIA. The Entente Allies proclaimed the independence of Albania, with Koritza as the capital. Italy proclaimed the independence of Albania at Permiti. *Current History, 6* (pt. 2), 87.

January, 1917.

9 GERMANY. Imperial Order issued making changes in contraband list. Texts; *London Gazette* No. 30011.

25 ITALY. Italy acceded to the convention of Nov. 9, 1914, between Great Britain and France relative to prizes captured during the present war. English and Italian texts: *G. B. Treaty Series*, 1917, No. 6.

February, 1917.

10 AUSTRIA-HUNGARY. Informed neutral Powers that armed merchantmen will be treated as warships and asked that neutral citizens be warned not to trust their lives and property to such ships. *N. Y. Times*, Feb. 11, 1917.

11 ABYSSINIA. Zeodita, the granddaughter of King Menelik, succeeded to the throne of Abyssinia as empress. *Times*, April 3, 1917; *N. Y. Times*, May 26, 1917.

15 UNITED STATES. The Secretary of State announced that the Government of the United States considers that commercial vessels have the right to carry arms in self-defense. *N. Y. Times*, Feb. 16–17.

March, 1917.

2 FRANCE-SWEDEN. Ratifications exchanged of convention for the protection of trade-marks signed Jan. 31, 1916. *J. O.*, 1917: 2213.

2 AUSTRIA. Replied to the American note of Feb. 18, stating the position of Austria on the submarine issue. *Text issued by the Dept. of State.*

9 NICARAGUA—SALVADOR. Central American Court of Justice decided in favor of Salvador in the case brought by Salvador to test the right of Nicaragua to lease territory in the Gulf of Fonseca. *Anales de la corte de Jucticia Centroamericana, 6*:96.

15 UNITED STATES — COLOMBIA. The treaty settling the dispute between Colombia and the United States relative to Panama withdrawn from the Senate. *Congressional Record*, March 15, 1917.

20 GERMANY. Hospital ship *Asturias* sunk. *London Times*, (weekly ed.) March 20, 1917.

30 GERMANY. Hospital ships *Saita* and *Gloucester Castle* sunk; *Current History, 6:* 442.

April, 1917.

2 UNITED STATES. Congress convened. The President made an address regarding relations with Germany. Text: *Cong. Record, 55*:2.

2 UNITED STATES. American armed steamer *Aztec* sunk. *N. Y. Times*, April 3, 1917.

4 UNITED STATES. The Senate passed a resolution declaring a state of war to exist between the United States and Germany. *Cong. Record, 55*:182.

5 UNITED STATES. Executive Order issued announcing defensive zones around coasts of United States. *Text issued by Dept. of State; N. Y. Times*, April 14, 1917.

6 UNITED STATES. The House of Representatives passed a resolution declaring a state of war to exist between the United States and Germany. The President signed the resolution. *Cong. Record, 55*:242; *Public Resolution* No. 1. 65th Cong. 1st sess.

6 UNITED STATES. President issued proclamation of state of war with Germany and regulations governing alien enemies. Text: *Proclamation* No. 1364.

6 UNITED STATES. Proclamation relative to German insurance companies doing business in the United States. *Proclamation* No. 1366.

6 UNITED STATES. German-owned vessels seized. Ninety-one such vessels were in the ports of the United States. Eleven hundred Germans from the ships were interned. *N. Y. Times*, April 7, 1917.

6 BOLIVIA — UNITED STATES. Bolivia replied to the American note announcing declaration of a state of war against Germany. Spanish text: *La Prensa* (Buenos Aires), April 7, 1917.

6 COLOMBIA — UNITED STATES. Colombia replied to the American note announcing declaration of a state of war against Germany. Spanish text: *La Prensa* (Buenos Aires), April 7, 1917.

7 PANAMA. The President of Panama signed proclamation pledging aid of Panama to the United States in the war with Germany. The exequaturs of German consuls were canceled. Text: *N. Y. Times*, April 8, 1917.

7 CUBA — GERMANY. Cuban Senate and House of Representatives unanimously passed the bill declaring a state of war to exist with Germany. The bill was signed by the President. German ships in Cuban waters were seized. *B. O. de la Sec. de Estado* (Cuba) 14: 211. *N. Y. Times*, April 8, 9, 1917.

7 ARGENTINE REPUBLIC — GERMANY. Germany protested against the action of Argentine Republic in placing German ships under an armed guard. *N. Y. Sun*, April 20, 1917.

8 CUBA — GERMANY. German minister to Cuba handed passports. *N. Y. Times*, April 9, 1917.

8 GERMANY. Germany issued warning to mariners not to approach places from which attacks may be made or roadsteads from which embarkation of troops may be made, as mines have been sown in such places. Text: *Issued by the Department of State.*

8 AUSTRIA-HUNGARY — UNITED STATES. Austria handed passports to the American chargé. On April 9, the Austrian chargé at Washington applied to the Department of State for passports. *Text of notes issued by the Department of State.*

8 Death of Richard Olney, Vice President of the American Society of International Law and former Attorney-General and Secretary of State of the United States. *N. Y. Times,* April 10, 1917.

9 GUATEMALA. Martial law declared in Guatemala. *N. Y. Times,* April 11, 1917.

10 URUGUAY. Announced neutrality in the war between Germany and the United States and Germany and Cuba. Spanish texts: *B. del Min. de Rel. Ext.* (Uruguay), *5*:268.

10 MEXICO — UNITED STATES. Mexico replied to the American note announcing declaration of a state of war with Germany. *N. Y. Times,* April 11, 1917.

10 CHILE. Announced neutrality in the war between the United States and Germany. *El Diario Illus.* (Santiago de Chile), April 11, 1917.

10 ARGENTINE REPUBLIC. Announced neutrality in the war between the United States and Germany, but pledged support of the United States in the position with reference to Germany. Spanish text: *La Prensa* (Buenos Aires), April 11, 1917; English text: *Buenos Aires Herald,* April 11, 1917.

11 BRAZIL — GERMANY. Brazil broke off diplomatic relations with Germany. The German minister left Rio de Janeiro April 27. Portuguese text of note: *Jornal do Commercio,* April 12, 1917.

12 COSTA RICA. Costa Rica offered use of ports of Costa Rica for American ships. Text: *N. Y. Times,* April 13, 1917.

12 GERMANY — UNITED STATES. Germany announced that Americans in Germany would not be interned. *N. Y. Times,* April 13, 1917.

13 BOLIVIA — GERMANY. Bolivia handed passports to the German minister with note breaking off diplomatic relations. Spanish text: *B. del Min. de Rel. Ext.* (Uruguay), *5*:296.

13 ARGENTINE REPUBLIC. The Argentine ship *Monte Protegido* sunk. Spanish texts of notes exchanged between Argentine Republic and Germany: *La Prensa* (Buenos Aires), April 22, May 2, 1917; English texts: *Buenos Aires Herald,* May 3, 1917.

14 AUSTRIA-HUNGARY — UNITED STATES. American chargé left Vienna. *N. Y. Times*, April 16, 1917.

15 FRANCE — UNITED STATES. French decree signed appointing a high commission to the United States. *J. O.*, 1917: 3004.

15 UNITED STATES. The President issued an appeal to the people to serve together. Text: *N. Y. Times*, April 16, 1917.

17 UNITED STATES — MEXICO. Ignacio Bonillas, the first Mexican Ambassador to be received by the United States since the death of President Madero of Mexico, presented his credentials to the President and was formally accepted as diplomatic representative from Mexico. *N. Y. Times*, April, 19, 1917.

18 HUNGARY. Count Tisza resigned as Premier of Hungary and Count Esterhazy was appointed. *N. Y. Times*, April 19, 1917.

18 SPAIN. Marquis Manuel Garcia Prieto, President of the Senate, formed new cabinet. List of members: *N. Y. Sun*, April 20, 1917.

19 NICARAGUA. Replied to American notice of the state of war with Germany and expressed sympathy, but made no mention of neutrality. *N. Y. Times*, April 20, 1917.

19 NETHERLANDS. Proclaimed neutrality in war between Germany and the United States and Germany and Cuba. Dutch text: *Staatscourant*, April 19, 1917.

20 SPAIN — GERMANY. Spain presented note to Germany protesting against the sinking of the *San Fulgencia* and asking definite statement as to submarine policy. Text: *London Times* (weekly ed.), April 27, 1917.

20 GREAT BRITAIN — PORTUGAL. Great Britain rented German ships from Portugal. *N. Y. Times*, April 21, 1917.

21 TURKEY — UNITED STATES. Turkey announced the breaking off of diplomatic relations with the United States. American Ambassador Elkus, who was ill, was allowed to remain. He left Turkey June 1. *N. Y. Times*, April 22, June 4, 1917.

21 GREAT BRITAIN — UNITED STATES. A high commission headed by Hon. A. J. Balfour left England April 11 and arrived in the United States May 21. *Current History*, June, 1917.

22 ARGENTINE REPUBLIC. Invited South American nations to hold a conference to formulate a common policy with respect to the war. On July 12, it was announced that the Congress was postponed indefinitely. *Washington Post*, July 12, 1917

22 GERMANY. The International Red Cross Committee has addressed a note to the German Government referring to the German order issued on January 29 regarding hospital ships and to the torpedoing of hospital ships *Asturias*, *Britannic* and *Gloucester Castle*. *London Times* (weekly ed.), April 27, 1917.

23 FRANCE. France announced that German prisoners would be embarked on hospital ships owing to the German order of January 29 relative to the torpedoing of hospital ships. *London Times* (weekly ed.), April 27, 1917.

24 FRANCE. French high commission headed by Marshal Joffre and M. Viviani arrived at Hampton Roads. *Current History*, June, 1917.

25 CHILE — BOLIVIA. Chile replied to the Bolivian notification of breaking off of diplomatic relations with Germany. Spanish text: *La Prensa* (Buenos Aires), April 26, 1917.

26 GREAT BRITAIN. Admiralty Notice to Mariners No. 434 issued canceling No. 319, cautioning against dangerous areas in the North Sea except Danish and Netherland waters. *London Gazette*, No. 30037.

27 BOLIVIA — URUGUAY. Following treaties announced in process of negotiation: 1. Amplification of treaty relative to legal procedure, letters rogatory, etc.; 2. General obligatory arbitration; 3. Exchange of titles, and cabotage. *D. O.* (Uruguay), May 24, 1917; *La Prensa* (Buenos Aires) April 27, 1917.

28 BRAZIL. Announced neutrality in the war between Germany and the United States. On May 29, the House of Representatives passed a bill revoking this declaration and authorized the President to seize German ships. *N. Y. Times*, May 1, 30, 1917.

28 GUATEMALA — GERMANY. The National Assembly approved decree issued by President breaking off diplomatic relations. Passports were handed the German Minister, with eight days' notice to leave Guatemala, and the Guatemalan Minister to Germany was recalled by cable. *N. Y. Times*, April 29, 1917.

30 GREECE. Greek chargé at Washington issued statement explaining position of Greek Government. *N. Y. Times*, May 1, 1917.

30 ARGENTINE REPUBLIC — BOLIVIA. Argentine Republic replied to the Bolivian notification of the breaking off of diplomatic relations with Germany. Spanish text: *La Prensa* (Buenos Aires), May 1, 1917.

May, 1917.

1 RUSSIA. Formal declaration made by the new cabinet that no separate peace would be made with Germany. Text: *N. Y. Times*, May 4, 31, 1917.

1 MEXICO. Venustiano Carranza took oath of office as President of Mexico, the first constitutional executive in four years. *D. O.* (Mexico), May 2, 1917.

2 BRAZIL. Dr. Lauro Müller, Minister for Foreign Affairs, resigned. Dr. Nils K. Pecanha was appointed in his place. *Journal do Commercio*, May 3, 1917.

4 GREECE. Entente Ministers presented note to Greek Government requesting reëstablishment of Allied control of customs, railways, etc., in accordance with the Allied ultimatum of Dec. 31, 1916. *London Times* (weekly ed.), May 11, 1917.

4 RUSSIA. Council of Workmen and Soldiers declared for peace without annexations or indemnities, but voted to sustain the provisional government. *Independent*, May 12, 1917.

4 GREECE. New cabinet formed with Premier and Foreign Minister Alexander Zaimis. List of members: *N. Y. Times*, May 5, 1917.

4 AUSTRIA-HUNGARY — UNITED STATES. Count Adam Tarnowski sailed from New York with safe conduct from the Entente Allies. *N. Y. Times*, May 5, 1917.

5 UNITED STATES. The President signed bill allowing foreign governments to enlist their nationals in the United States. *Public Act No. 10.* 65th Cong. 1st sess.

5 ROUMANIA. Roumanian Chamber of Deputies sent message of congratulation to the House of Representatives of the United States on the entry of the United States into the war. Text: *Cong. Record*, vol. 55: 1917; *House Doc. 121*, 65th Cong. 1st sess.

7 KRONPRINZESSIN CECILE. The United States Supreme Court held that the captain of the ship was justified in putting back on the eve of war. The suit was brought by the Guaranty Trust Company for $2,240,000 damages for failure to deliver at Plymouth and Cherbourg $11,000,000 in gold consigned by the Trust Company to its representatives in England and France. *U. S. Supreme Court Reports*, vol. 243.

7 BOLIVIA. José Nestor Gutiérrez, Minister of War, elected Presi-

dent of Bolivia, succeeding Gen. Ismael Montes. *N. Y. Times*, May 8, 1917.

8 GERMANY — UNITED STATES. German Admiralty announced that the *Healdton* was sunk by a German submarine. *N. Y. Times*, May 9, 1917.

9–10 ITALY. Italian High Commission headed by Enrico Erlotta, Minister of Transportation, and Prince Udine, arrived in New York. *N. Y. Times*, May 11, 1917.

9 LIBERIA — GERMANY. Liberia broke off diplomatic relations with Germany. *N. Y. Times*, May 10, 1917.

9 NICARAGUA — GERMANY. Nicaragua broke off diplomatic relations with Germany. *N. Y. Times*, May 20, 1917.

10 GERMANY — BELGIUM. It was admitted in the German Reichstag that Belgian subjects resident of Cologne had been drafted into the German army. The Belgian Minister to the United States protested against this practice in July, 1916. The German Government contended that Belgians resident in Germany five years had lost their Belgian nationality and were subject to the laws of the empire, including enforced military service. *N. Y. Sun*, May 11, 1917.

10 RUSSIA. The President of the Duma, M. Rodzianko, in an address to the Duma, declared that Russia would make no separate peace. *N. Y. Times*, May 12, 1917.

10 RUSSIA. The Council of Soldiers' and Workmen's Delegates passed a resolution calling for a world peace conference. Text: *N. Y. Times*, May 12, 1917.

10 UNITED STATES. Announced by the Navy Department that the first enlisted men to be landed in France after the declaration of war were the armed guard of the *Aztec* sunk April 1. *U. S. Official Bulletin*, vol. 1, No. 4.

10 GERMANY — TURKEY. Discussion in the German Reichstag of ten treaties with Turkey to take the place of the capitulations. *N. Y. Times*, May 17, 1917.

11 HAITI — GERMANY. Haitian Congress refused to pass resolution declaring war on Germany. A resolution was adopted protesting against the submarine warfare. The President was authorized to break off diplomatic relations with Germany if reparation was not made for the death of Haitians on the French ship *Montreal* which was torpedoed. *N. Y. Times*, May 12, 1917.

11 UNITED STATES — RUSSIA. High Commission to Russia announced as follows: Elihu Root, Envoy Extraordinary and Plenipotentiary; Charles Crane, John R. Mott, Cyrus McCormick, Samuel Bertron, James Duncan, Charles E. Russell, Major General Hugh L. Scott, and Rear Admiral James H. Glennon. The commission arrived in Russia, June 13, 1917. *U. S. Official Bulletin*, vol. 1, No. 3, p. 4.

11 CHINA — GERMANY. House of Representatives failed to pass the resolution declaring war on Germany. *N. Y. Times*, May 12, 1917.

12 UNITED STATES. The President signed the resolution authorizing the President to take over the title for the United States of ships owned in whole or in part by Germans found in ports under American jurisdiction and to put them into service. *Public Resolution No. 2*, 65th Cong. 1st sess.

12 SCANDINAVIA. Conference between Sweden, Denmark and Norway ended. Announcement made that the countries would remain neutral. *N. Y. Times*, May 13, 1917.

14 UNITED STATES. Additional Executive Order issued announcing defensive zones. *Executive Order*, No. 2597.

14 DEATH OF HON. JOSEPH H. CHOATE, Vice-President of the American Society of International Law, and former Ambassador to the Court of St. James. *N. Y. Times*, May 15, 1917.

15 GERMANY — RUSSIA. Chancellor Von Bethmann-Hollweg announced in Reichstag Germany's willingness to make a separate and easy peace with Russia. *N. Y. Times*, May 15, 1917.

16 CUBA — UNITED STATES. The United States sent note to Cuban Government thanking the government for the support of the Cuban declaration of war against Germany and stating the position of the United States in regard to the present internal troubles in Cuba. Text: *N. Y. Times*, May 17, 1917.

16 FRANCE — BRAZIL. French decree passed authorizing the ratification of the convention for the protection of literary, artistic and scientific property signed December 15, 1913. *J. O.*, 1917: 4053.

16 RUSSIA. The Premier and Minister for Foreign affairs, Paul Milukoff, resigned from the Cabinet and was succeeded by M. Tereschtenko. List of members of new cabinet: *N. Y. Times*, May 17, 1917.

17 HONDURAS — GERMANY. Honduras severed diplomatic relations with Germany. *Washington Post*, May 19, 1917.

18 UNITED STATES. The President signed the Army bill designed to raise in one year 1,000,000 men. He also signed the proclamation putting into effect the selective draft provision of the act. *Proclamation*, No. 1370.

19 CHINA — GERMANY. The House of Representatives of China refused to consider any war measure until the Premier and Minister of War, Tuan Chi Hui, had resigned and the Cabinet had been reorganized. *N. Y. Times*, May 20, 1917.

21 GERMANY — SWEDEN. Germany reported to have expressed to Sweden regret at the sinking by German submarines of the Swedish ships *Aspen*, *Vaterland* and *Kiken* in the Gulf of Bothnia. These ships, laden with grain, had just been released by Great Britain under a reciprocal agreement. *N. Y. Times*, May 22, 1917.

21 UNITED STATES — GERMANY. Franz von Rintelin, David Lamar, and H. B. Martin were found guilty and sentenced to one year in the penitentiary for violation of the Sherman Anti-Trust Act in attempting to prevent the shipment of munitions abroad. *N. Y. Times*, May 22, 1917.

21 GERMANY — BRAZIL. The German Prize Court at Hamburg decided adversely on six pleas entered to obtain release of the Brazilian steamer *Rio Pardo* captured Dec. 9, 1916, from Rotterdam for Hull with cargo of foodstuffs. *N. Y. Times*, May 22, 1917.

22 SOCIALIST CONFERENCE. Socialists met in Stockholm in conference. The Secretary of State of the United States refused passports to American delegates to the conference. The Sailors and Seamen's Union of Great Britain refused to allow the British delegates to travel by sea to Stockholm. *N. Y. Times*, June 13, 14, 1917; *London Times*, June 26, 27, 1917.

22 UNITED STATES. The President issued Executive Orders directing the Secretary of the Treasury to turn over certain German ships to the Secretary of the Navy to be used as colliers, etc., and directing the Secretary to the Navy to take title and equip for the service of the Navy of the United States certain other German ships. Texts: *U. S. Official Bulletin*, vol. 1, No. 18; *Executive Orders*, Nos. 2624, 2625.

23 UNITED STATES. Proclamation setting forth rules and regulations for the management of Panama Canal and maintenance of its neutrality. *Proclamation*, No. 1371.

24 UNITED STATES. Proclamation under which American citizens owning letters patent in Germany are permitted to pay any required fee, annuity, etc. *Proclamation*, No. 1372.

26 GERMANY. Germany announced the intention to sink hospital ships in the entire barred zone, except certain ships from Salonika to Gibraltar. Text: *N. Y. Times*, May 27, 1917.

26 GERMANY — UNITED STATES. Announced that 97 Americans are detained as hostages in Germany. *N. Y. Times*, May 27, 1917.

26 RUSSIA — UNITED STATES. The United States sent note to Russia stating position of the United States relative to the war. Text: *Current History*, vol. 6, Pt. 2:49.

27 GERMANY. Germany denied safe conduct to Belgian relief ships. *N. Y. Times*, May 28, 1917.

28 June 1. National Conference on the Foreign Relations of the United States held at Long Beach, Long Island, under the auspices of the Academy of Political Science in the City of New York in co-operation with the American Society of International Law. *N. Y. Times*, May 29–June 2, 1917.

29 GERMANY — BELGIUM. A new war tax of 10,000,000 francs levied by Germany in Belgium, making a total tax of 720,000,000 francs. *N. Y. Times*, May 29, 1917.

29 BRAZIL — GERMANY. Brazilian House of Representatives passed resolution revoking the proclamation of Brazilian neutrality in the war between Germany and the United States, and authorizing the President of Brazil to seize German ships. *N. Y. Times*, May 20, 1917.

30 RUSSIA. Council of Workmen's and Soldiers' Delegates announced that its special committee had decided to convoke an international conference at Stockholm if no objections are raised to that city as a place of meeting. The date proposed is between July 15 and 30 if that suits the Dutch Bureau and the Berne Committee. *London Times* (weekly ed.), June 8, 1917.

KATHRYN SELLERS.

GREAT BRITAIN [1]

Aliens Restriction Order, 1916. Order in Council further amending. Feb. 6, 1917. (St. R. & O. 1917, No. 128.) 1½d.

Birds, migratory, protection of, in Canada and the United States Convention between the United Kingdom and United States, signed at Washington, Aug. 16, 1916. (Treaty Series, 1917, No. 7.) 1½d.

British and foreign state papers. Vol. 106. 1913. 10s. 7d.

British prisoners of war and interned civilians in Germany. Further correspondence with the United States Ambassador respecting the treatment of. (Cd. 8477.) 4d.

Contraband of war. Proclamation making certain additions to, and amendments in, the list of articles to be treated as. Dec. 29, 1916. (St. R. & O. 1916, No. 910.) 1½d.

Defense of the Realm Manual. 2nd enlarged edition, revised to November 30, 1916, comprising introductory note; the Defence of the Realm Acts, as passed, with notes; the Defence of the Realm Regulations, as amended to November 30, 1916, printed in consolidated form, as provided by Orders in Council, with notes; Orders of a general character made under the Regulations to November 30, 1916, with notes; the Evidence (Amendment) Act, 1915: Analytical Index to Acts, Regulations, Orders, and notes. 2s. 4d.

Enemy Banks (London agencies). Report of Sir William Plender. Dec. 16, 1916. (Cd. 8430.) 4s.

———. Report of Messrs. Walter Leaf and R. V. Vassar Smith, with appendix, dated Jan. 12, 1917, on the progress made in discharge of the liabilities of the enemy banks in London. (Cd. 8455.) 1½d.

Extradition treaty between the United Kingdom and Siam, March 4, 1916. Accession of the States of Johore, Kedah, Perlis, Kelantan, and Trengganu. (Treaty Series, 1917, No. 3.) 1½d.

Netherlands. Order of Council further amending proclamation of

[1] Official publications of Great Britain may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

June 25, 1915, prohibiting the exportation of all articles to the Netherlands unless consigned as therein specified. (St. R. & O. 1916, No. 899.) Dec. 22, 1916. 1½d.

———. Feb. 23, 1917. (St. R. & O. 1917, No. 181.) 1½d.

Peace. Reply of the Allied Governments to the note communicated by the United States Ambassador on Dec. 20, 1916, containing the suggestion by the President of the United States that the belligerents in the present European War may state the terms on which the war might be concluded. (Cd. 8468.) 1½d.

———. Despatch to His Majesty's Ambassador at Washington respecting the. (Cd. 8439). 1½d.

———. Reply to the German peace note communicated by the French Government, on behalf of the Allied Powers, to the United States Ambassador in Paris, Dec. 30, 1916. (Cd. 8467.) 1½d.

Prize money, naval. Order in Council regulation the method and conditions of distribution of. Feb. 6, 1917. (St. R. & O. 1917, No. 212.) 1½d.

Prizes captured during the present war. Accession of Italy to the convention of Nov. 9, 1914, between the United Kingdom and France. London, Jan. 15, 1917. (Treaty Series, 1917, No. 6.) 1½d.

Reprisals restricting enemy commerce. Order in Council defining the expressions "enemy destination," "enemy origin," and "enemy property" in articles III and IV of the Order in Council of March 11, 1915. Jan. 10, 1917. (St. R. & O. 1917, No. 6.) 1½d.

———. Order in Council supplemental to Orders of March 11, 1915, and Jan. 10, 1917, for preventing commodities of any kind from reaching or leaving enemy countries. (St. R. & O. 1917, No. 163.) 1½d.

Safety of life at sea. Order in Council further postponing the coming into operation of the Merchant Shipping Convention Act, 1914, until Jan. 1, 1918. Dec. 22, 1916. (St. R. & O. 1916, No. 915.) 1½d.

Ships and cargoes brought into British ports under the Order in Council of March 11, 1915. Report of the committee appointed to enquire whether any avoidable delay is caused by the methods hitherto adopted. (Cd. 8469.) 1½d.

Switzerland. Proclamation prohibiting the exportation of certain articles to. March 13, 1917. (St. R. & O. 1917, No. 238.) 1½d.

Trading with the enemy. Consolidated statutory list of persons and firms in countries, other than enemy countries, with whom persons and firms in the United Kingdom are prohibited from trading. With

notes to British merchants engaged in foreign trade. Complete to Feb. 16, 1917. Prefaced by the proclamation, May 23, 1916, prohibiting trading with certain persons, or bodies of persons, of enemy nationality or enemy association. No. 19a. 7½d.

Treaty series, 1912–1916. General index. (Treaty Series, 1917, No. 4.) 4d.

UNITED STATES [2]

Aeronautics. Address on command of the air by Robert E. Peary delivered before the 20th annual meeting of the American Academy of Political and Social Science, Philadelphia, Pa., April 29, 1916. 10 p. (S. doc. 687.) Paper, 5c.

Alien enemies. Directions issued by Attorney General for enforcement of President's proclamation of April 6, 1917. 2 p. *Justice Dept.*

———. Directions to United States marshals and attorneys for enforcement of President's proclamation of April 6, 1917. 4 p. *Justice Dept.*

———. Hearings on bill for registration of. Feb. 28, 1917. 27 p. [Includes laws governing restrictions on aliens in Great Britain, France, Italy, Germany, Austria-Hungary since beginning of European War; prepared by Legislative Reference Division, Library of Congress.] *Immigration and Naturalization Committee.*

American National Red Cross. Regulations governing employment of, in time of war. 1917. 11 p. Paper, 5c. *War Dept.*

Armed merchant ships. Report to accompany bill to authorize the President to supply merchant ships, property of citizens of United States and bearing American registry, with defensive arms, etc. [Includes minority views.] Feb. 28, 1917. 6 p. (H. rp. 1594.) *Foreign Affairs Committee.*

Birds, migratory, protection of. Hearings on bill to give effect to convention between United States and Great Britain, signed Aug. 16, 1916. Feb. 3–6, 1917. 2 pts. 42 p. *Foreign Affairs Committee.*

———. Report to accompany bill. Feb. 6, 1917. 4 p. (H. rp. 1430.) *Foreign Affairs Committee.*

———. April 20, 1917. 4 p. (S. rp. 27.) *Foreign Relations Committee.*

[2] When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

Bonds of United States. Act to authorize issue of bonds to meet expenditures for national security and defense, and, for purpose of assisting in prosecution of the war, to extend credit to foreign governments. April 24, 1917. 4 p. (Public 3.) 5c.

Citizenship. Proceedings of First Citizenship Convention, Washington, D. C., July 10–15, 1916. 86 p. Paper, 10c.

———. Report to accompany bill to amend act in reference to expatriation of citizens and their protection abroad, as to citizenship of children heretofore born or hereafter born out of limits and jurisdiction of United States, whose fathers were, or may be at time of their birth, citizens thereof. Feb. 6, 1917. 2 p. (H. rp. 1436.) *Immigration and Naturalization Committee.*

Claims of Austria-Hungary, Greece, and Turkey for injuries inflicted on their nationals during riots in South Omaha, Nebr., Feb. 21, 1909. Report to accompany bill to authorize payment of indemnities. Feb. 15, 1917. 2 p. (H. rp. 1497.) *Foreign Affairs Committee.*

Consular service. Information regarding appointments and promotions in. Reprint 1917. 18 p. *State Dept.*

Cuba and the German Empire. Message transmitted to House of Representatives of United States by House of Representatives of Cuba, announcing pride of the people of Cuba in uniting their efforts to those of United States in war against Germany. April 11, 1917. 1 p. (H. doc. 18.) *House of Representatives.*

Diplomatic service. Information regarding appointments and promotions in. 1917. 14 p. *State Dept.*

Dominican Republic. Convention between United States and, for collection and application of customs revenues of Dominican Republic, signed Feb. 8, 1907. Reprint, with slight changes. 1917. 8 p. (Treaty Series 465.) *State Dept.*

Exports. Report to accompany bill to authorize President in time of war to give direction to exports from United States so as to insure their wise, economical, and profitable distribution to other countries. April 27, 1917. 1 p. (H. rp. 32.) *Interstate and Foreign Commerce Committee.*

German and Austrian vessels in ports of United States and its possessions. Statement presented by Mr. Lodge. 1917. 4 p. (S. doc. 722.) *Navigation Bureau.*

Germany. Report concerning note of German Secretary of Foreign Affairs sent Jan. 19, 1917, to German Minister to Mexico proposing

alliance with Mexico and Japan against United States. March 1, 1917. 2 p. (S. doc. 728.) *State Dept.*

———. Severance of diplomatic relations with. Address of President of United States to Congress. Feb. 3, 1917. 6 p.

———. Address of President of United States to Congress asking authority to employ such instrumentalities and methods as may be necessary to protect American ships and people in their legitimate and peaceful pursuits on the seas. Feb. 26, 1917. 6 p.

———. War against. Address of President advising Congress to declare. April 2, 1917. 10 p. Paper, 5 c.

———. Report to accompany joint resolution declaring, and making provision to prosecute same. April 3, 1917. 1 p. (S. rp. 1.) *Foreign Relations Committee.*

———. April 4, 1917. 14 p. (H. rp. 1.) *Foreign Affairs Committee.*

———. Joint resolution declaring and making provision to prosecute same. April 6, 1917. 1 p. (Pub. res. 1.) 5c.

———. Proclamation of existence of war. April 6, 1917. 3 p. (No. 1364.) *State Dept.*

———. President's address relative to coöperation of his fellow countrymen during present war. April 16, 1917. 4 p.

Immigration. Act to regulate. Feb. 5, 1917. 27 p. (Public 301.) Paper, 5c.

International relations. Address on America's position in two world wars by Atlee Pomerene delivered at celebration of 185th anniversary of birth of George Washington, Washington, D. C., Feb. 22, 1917. 9 p. (S. doc. 725.) *Senate.*

———. History of laws prohibiting correspondence with a foreign government and acceptance of a commission. By Charles Warren. Assistant Attorney General. 1917. 23 p. (S. doc. 696.) Paper, 5c,

———. Laws of United States relating to war, diplomatic intercourse, blockades, and neutrality. 34 p. (S. doc. 714.) Paper, 5c.

Malambo fire claimants. Report to accompany bill to pay Panama amount awarded by joint commission under Article 6 of treaty of Nov. 18, 1903. Feb. 8, 1917. 1 p. (S. rp. 1019.) *Foreign Relations Committee.*

Maritime law. Report to accompany bill relating to maintenance of actions for death on high seas. Feb. 5, 1917. 4 p. (H. rp. 1419.) *Judiciary Committee.*

Munitions. Report to accompany bill to punish destruction or injuring of war material and war transportation facilities and to forbid hostile use of property during time of war. April 13, 1917. 1 p. (H. rp. 11.) *Judiciary Committee.*

Naturalization laws and regulations. Feb. 15, 1917. 36 p. Paper, 5c.

Neutrality. History of our relations with Germany and Great Britain as detailed in documents that passed between United States and two great belligerent Powers. By S. D. Fess. 1917. 2 pts. 431 p. [Part 1, Submarine controversy; Part 2, Restraints of trade controversy.] (H. doc. 2111, 64th Cong. 2d sess.) Paper, each 15c.

Niagara River water power. Hearings on bills for control, regulation and use of. 1917. 135 p. il. *Foreign Relations Committee.*

Norway. Communication, with accompanying papers, in relation to claim presented by, against United States on account of detention of three members of crew of Norwegian ship *Ingrid.* April 28, 1917. 2 p. (H. doc. 81.) *State Dept.*

Pan American Scientific Congress. Segundo Congreso Científico Panamericano: Acta final y su comentario; preparados por James Brown Scott. 1916. 502 p. *State Dept.* [The English edition of this publication was entered in this JOURNAL for October, 1916, p. 908.]

Panama Canal. Difficulties encountered in applying present laws relating to collection of tolls on vessels using. 12 p. *Panama Canal.* (Washington Office.)

———. Executive order authorizing Governor of The Panama Canal to exclude certain undesirable classes of persons from the Canal Zone. Feb. 6, 1917. 3 p. (No. 2527.) *State Dept.*

———. Executive order relating to exclusion of Chinese from the Canal Zone. Feb. 6, 1917. 2 p. (No. 2526.) *State Dept.*

———. Hearings concerning estimates for construction and fortification of. 1917. 118 p. *Appropriations Committee.*

———. Report to accompany bill providing that Panama Canal rules shall govern in measurement of vessels for imposing tolls. Feb. 8, 1917. 4 p. (S. rp. 1015.) *Inter-oceanic Canals Committee.*

———. April 10, 1917. 4 p. (S. rp. 6.) *Interoceanic Canals Committee.*

Passports. Rules governing granting and issuing of. 1917. 6 p. *State Dept.*

Peace problem. Address by John Bassett Moore delivered at

Founder's Day celebration of the Carnegie Institute in Pittsburgh, Pa., April 27, 1916. 13 p. (S. doc. 700.) Paper, 5c.

Porto Rico. An Act to provide civil government for. March 2, 1917. 21 p. (Public 368.) Paper, 5c.

Radio communications. Hearings on bill to regulate. Jan. 11–26, 1917. 447 p. *Merchant Marine and Fisheries Committee.*

———. Laws of United States and international radio-telegraphic convention, regulations governing radio operators and use of radio apparatus on ships and on land. July 27, 1914. [Reprint 1917, with addenda.] 100 p. il. Paper, 5c.

Recruiting and enlistment. Report to accompany bill to amend criminal code so as to allow country engaged in war with country with which United States is at war to recruit among its own citizens and subjects within borders of United States. April 16, 1917. 1 p. (H. rp. 14.) *Judiciary Committee.*

———. April 18, 1917. (S. rp. 21.) 2 p. *Judiciary Committee.*

Russia. Report to accompany resolution that United States congratulate the people of Russia on their assumption of powers, duties, and responsibilities of self-government. April 13, 1917. 5 p. (H. rp. 12.) *Foreign Affairs Committee.*

Ruthenians (Ukrainians). Joint resolution requesting the President to appoint a day on which funds may be raised for relief of. March 2, 1917. (Pub. res. 52.) Paper, 5c.

———. Proclamation appointing day. March 16, 1917. (No. 1359.) *State Dept.*

Seal and seal fisheries. Report relating to alleged illegal killing of fur seals in Pribilof Islands and opinion of Attorney General in relation thereto. Feb. 28, 1917. 6 p. (S. doc. 726.) *Justice Dept.*

Shipping Board. Statements of William Denman, chairman, and Theodore Brent, commissioner of Shipping Board, and Charles Yates, Coast and Geodetic Survey. 1917. 23 p. 1 tab. *Appropriations Committee.*

Ships. Proclamation forbidding transfer of any vessel registered under laws of the United States to any person not citizen of United States or to foreign registry or flag. Feb. 5, 1917. *State Dept.*

———. Report to accompany bill to regulate conduct of vessels in United States ports in case of war. Feb. 15, 1917. 1 p. (H. rp. 1496.) *Judiciary Committee.*

———. Report to accompany bill to prevent injury to vessels en-

gaged in foreign commerce. Feb. 5, 1917. 1 p. (H. rp. 1426.) *Judiciary Committee.*

Sovereignties and their rulers. List of. 11th ed. Jan. 1, 1917. *Naturalization Bureau.*

Spies. Hearings on bill to punish espionage and interference with neutrality. Feb. 22, 1917. 31 p. (Serial 53.) *Judiciary Committee.*

———. Report to accompany bill. Feb. 28, 1917. 3 p. (H. rp. 1591.) *Judiciary Committee.*

———. Report to accompany bill to punish espionage and enforce criminal laws of United States. April 25, 1917. 10 p. (H. rp. 30.) *Judiciary Committee.*

Suits by States against Federal Government. Report to accompany bill giving consent for. Feb. 8, 1917. 3 p. (H. rp. 1444.) *Judiciary Committee.*

Treason and misprision of treason. Proclamation. April 16, 1917. 2 p. (No. 1368.) *State Dept.*

Water pollution. Hearings *in re* remedies for pollution of boundary waters between United States and Canada. June 21–27, and August 25, 1916. 161 p. Paper, 15c.

West Indies. Convention between United States and Denmark for cession of; signed New York, Aug. 4, 1916. 15 p. (Treaty Series 629.) *State Dept.*

———. An Act to provide temporary government for islands acquired by United States from Denmark. March 3, 1917. 2 p. (Public 389.) Paper, 5c.

———. Statements of Robert Lansing and Frank McIntyre, Feb. 12 and 14, 1917. 2 pts. 47 p. *Foreign Affairs Committee.*

———. Report to accompany bill to provide for temporary government. Feb. 17, 1917. 10 p. (H. rp. 1505.) Paper, 5c.

———. Payment by United States for. Proclamation. March 31, 1917. 1 p. (No. 2568.)

GEORGE A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

THE REPUBLIC OF EL SALVADOR *v.* THE REPUBLIC OF NICARAGUA

Central American Court of Justice

OPINION AND DECISION OF THE COURT [1]

San José de Costa Rica, on the ninth day of March, nineteen hundred and seventeen, at four o'clock, p.m.

In the action commenced and maintained by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua, arising out of the conclusion of a treaty by the latter with the Government of the United States of North America, known as the Bryan-Chamorro Treaty, which relates, among other matters, to the leasing of a naval base in the Gulf of Fonseca, the Court, having considered the proceedings had herein, hereby renders its decision.

The honorable the Chargé d'Affaires of El Salvador in this Republic, Dr. Don Gregorio Martin, intervened herein on behalf of the complainant Government and Dr. Don Alonso Reyes Guerra appeared on its behalf as attorney of record; the high party defendant was represented by Dr. Don Manuel Pasos Arana.

FIRST PART

CHAPTER I

It appears:

I. That on the 28th day of August, 1916, in accordance with powers to that end duly exhibited, the honorable the Chargé d'Affaires of El Salvador, Dr. Don Gregorio Martin, appearing in the name of his Government, brought before this Court a complaint against the Republic of Nicaragua wherein the conclusion of the Bryan-Chamorro Treaty by the latter Government with the United States of North America, was alleged. In support of the action, the complaint sets

[1] Translation published by the Legation of Salvador, Washington, D.C.

forth the arguments of fact and law, and it is accompanied by the evidence considered pertinent thereto by the high party complainant.

ARGUMENTS OF FACT AND LAW

Stated concretely, the high party complainant alleges as follows:

The treaty referred to, which was negotiated by the then Secretary of State of the United States, the Honorable William Jennings Bryan, and the then Minister of Nicaragua at Washington, General Don Emiliano Chamorro, in addition to granting to the United States certain rights for the construction of an interoceanic canal, grants to that Republic, for the term of ninety-nine years (renewable for a further term of the same duration), for the establishment of a naval base, a part of the Gulf of Fonseca. The stipulations of that pact are held by El Salvador to be highly prejudicial to her supreme interests, in that they endanger her security and preservation, violate her rights of co-ownership in the Gulf of Fonseca and strike at her legitimate hopes for the future as a Central American nation.

II. The complaint is made up of various captions intended to develop, from different points of view, the claims of the high party complainant.

The first caption is devoted to a discussion of the following point: "The treaty is an official act of the Government of Nicaragua that places in danger the national security of El Salvador." It begins with this paragraph:

> It must be patent to every one that the establishment, by a powerful state, of a naval base in the immediate vicinity of the Republic of El Salvador would constitute a serious menace — not merely imaginary, but real and apparent — to the freedom of life and the autonomy of that republic. And that positive menace would exist, not solely by reason of the influence that the United States, as an essential to the adequate development of the ends determined upon for the efficiency and security of the proposed naval base, would naturally need to exercise and enjoy at all times in connection with incidents of the highest importance in the national life of the small neighboring states, but would be also, and especially, vital, because in the future, in any armed conflict that might arise between the United States and one or more military Powers, the territories bounded by the Gulf of Fonseca would be converted, to an extent incalculable in view of the offensive power and range of modern armaments, into belligerent camps wherein would be decided the fate of the proposed naval establishment — a decision that would inevitably involve the sacrifice of the independence and sovereignty of the weaker Central American States as has been the case with the smaller nations in the present European struggle under conditions more or less similar.

At the outset, for the purpose of showing that, in negotiating that treaty, the Government of Nicaragua did not, as it has maintained, confine itself to its own exclusive territorial jurisdiction, but infringed thereby upon the rights of El Salvador, the Agadir case was invoked. That case involved an attempt by Germany, in 1911, to seize the port of Agadir on the Moroccan coast for the establishment of a naval base, which attempt occasioned protests on the part of England and France, who claimed that the project constituted a menace to their national security with respect to their colonies in South Africa, and, because of the nearness of that port, a menace to the route followed by their vessels bound for East India through the Strait of Gibraltar.

Cited also is the Magdalena Bay case, wherein the United States of North America made positive objection to the transfer by certain United States citizens, to a Japanese commercial company, of land along the shores of that bay and which had been ceded to them by the Mexican Government. The matter resulted in the adoption, by the United States Senate, of the so-called Lodge Resolution, which is quoted in the complaint as follows:

> That when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government not American as to give that Government practical power of control for national purposes.

In discussing the same point, the complaint quotes from the editorial comment on the Lodge Resolution contained in the *American Journal of International Law*,[1] and adds:

> The Lodge Resolution is susceptible of being misleading under the test of legal opinion, because the principle maintained therein does not refer to official acts or measures of government; nevertheless, it shows how far in the opinion of the North American Senate, a nation, even though powerful, may give way to its fears and display its zeal for national security, and for this reason the Foreign Office cites the Magdalena Bay case. Furthermore, the Senate's resolution puts in strong relief the fact that the opinion of that high legislative body of the United States — the nation with which the Bryan-Chamorro Treaty was concluded — is wholly in conformity with El Salvador's contentions against that treaty, however much that same high body, in its amendments to the said convention adopted at the time of its ratification, showed that it did not have it in mind to affect any existing right in either of the States of Costa Rica, El Salvador, or Honduras, which, however, it

[1] October, 1912 (vol. 6), p. 937. — Ed.

was recognized, had protested *for fear of the contrary*. This declaration of the United States Senate is in no way consonant with the spirit of the Lodge Resolution and the trend of opinion which, but a few years before, controlled that body in adopting the Lodge Resolution.

Consequently the reasoning on which the Government of Nicaragua relies in support of the legitimacy of its action in concluding the Bryan-Chamorro Treaty, when it says that it contracted "without injuring in the slightest degree the legitimate rights and interests of El Salvador or those of any other Central American Republics," is in manifest contradiction of the positions taken by other nations, for instance, the North American nation, through the medium of its national legislature; and it stands to reason that the fears entertained by the Government of El Salvador are of greater moment than were those of England and France in the Agadir case, and are of a character more definite and real than the fears that agitated the United States in the Magdalena Bay and other analogous cases contemplated by the Lodge Resolution.

III. Caption II of the complaint deals with the following point; "The Bryan-Chamorro Treaty ignores and violates the rights of co-ownership possessed by El Salvador in the Gulf of Fonseca." From the sixteenth century — says the complaint — when this gulf was discovered by the Spaniards, it belonged throughout the entire period of her dominion to Spain, the mother country, whose rights of exclusive ownership were never placed in doubt; and, on the emancipation of Central America, that ownership passed into the patrimony of the Federal Republic that was formed by the five States.

The complaint goes on to allege the exclusiveness of the Spanish ownership over those waters, the transfer of those rights to the Central American States constituting the Federal Government, and the exclusive ownership subsequently exercised by El Salvador, Honduras and Nicaragua, the geographic situation of the countries surrounding the gulf, the circumstance that the use of those waters for fishing and other analogous purposes has never been exercised or even claimed by any other nations, and, denying the pretensions of the Nicaraguan Government that the waters of the Gulf of Fonseca are not common to the three States, advances the following argument:

(*a*) That because, for a long period of years, those waters belonged to a single political entity, to wit, the Spanish Colonial Government in Central America, and, later, to the Federal Republic of the Center of America, the fact conclusively results that, on the dissolution of the federation without having effected a delimitation among the three riparian States of their sovereignty therein, the ownership of those waters continued in common in those three States.

(*b*) That it matters not that in the year 1900, as a consequence of the convention for the demarcation of boundaries, the Governments of Honduras and Nicaragua fixed a divisionary line between the two countries in the waters of the Gulf; because that act was brought about without the intervention of El Salvador, and such intervention was essential to its validity and practical effect, since it dealt with property that was common, not only as between Honduras and Nicaragua, but also to the sovereign State of El Salvador; and that that antecedent did not affect the root of the question, but, on the contrary, showed, as did the attempt that was made, in 1884, with the same object in view, by El Salvador and Honduras — without consummation, however — that the idea that has always prevailed among the three riparian States is that their ownership over the waters of the Gulf of Fonseca is an undivided ownership.

(*c*) That the reasons urged against the theory of coöwnership in the annual report of the Ministry of Foreign Relations of Nicaragua, to the National Congress for the year 1914, are unsound; and that in that report the Minister maintains on behalf of his Government the following:

> There exists, then, no community between Nicaragua and Honduras in the Gulf of Fonseca, and El Salvador, being neither a neighbor nor a co-boundary State with us — the Republic of Honduras lying in between — the community claimed with Nicaragua and alleged in the Salvadorean protest, does not and cannot exist.
>
> Furthermore, the status of common ownership in, and the indivisibleness of, the waters of a bay are very different from the status of an inheritance or an estate in lands, for, whereas, with respect to the former, there exists the general principle that the parts adjacent to their coasts belong to the several nations — so that, on the laying out of the terrestrial boundary line, demarcation of the maritime waters is understood — there is no similar principle with respect to landed properties, since at one point or another the coparceners thereof stand to receive what belongs to them indifferently — though even then, where those landed properties are contiguous, the civil law provides that the portion to be adjudicated to each co-parcener shall be that part of the common property which is contiguous to his own land.
>
> One nation cannot possess the right to a greater portion of the waters of a bay possessed in common with others than that shown to belong to it by the extension of its respective coasts; and the Republic of El Salvador being situated at the extreme northwest of the Bay of Fonseca, and that of Nicaragua in the extreme southeast, the two being separated by Honduras, the maritime ownership enjoyed by the first-named Republic could not possibly extend one inch farther than the point fixed by the limit of its coasts which separates it from Honduran territory.

That in opposition to this argument, the complaint maintains that the Gulf of Fonseca belongs to the category of what are called "his-

toric bays," such as the Chesapeake and Delaware Bays on the coasts of the Great Republic of the North, and the Bays of Conception, Chaleur and Miramiche in the Dominion of Canada; and it adopts wholly the doctrines put forth by the Salvadorean Foreign Office in its protests before the Department of State at Washington, which were directed first against the Chamorro-Weitzell Treaty, and later against the Bryan-Chamorro Treaty.

(*d*) That the circumstance that not one State alone, but three, possess the shores of the Gulf, does not prevent the application to the Gulf of Fonseca of the principles underlying historic bays, because those three States, in the course of their history, have not always been independent each of the others, but heretofore formed parts of a single international political entity.

(*e*) That, apart from its character as a historic bay, the Gulf of Fonseca presents the particular condition that its entrance, between the summits of the Islands of Meanguera and Meanguerita on the line traced from Chiquirín Point, on the mainland of El Salvador, to Rosario Point, in the northeast region of the peninsula that forms the Nicaraguan promontory of Cosigüina, is not of an extent greater than the ten miles fixed generally by the publicists as essential to considering a bay as "territorial" or "closed," and adds the following consideration:

> The geographical situation of the Salvadorean islands in the Gulf and the legal fact that they are separated from each other and from the island nearest the mainland, and the latter from Chiquirín Point, by narrow straits, the lower depths of which are sown with sand banks which in some instances prevent navigation by vessels of large draft, and, in others, permit navigation only through channels of narrow width that have been established by soundings, are elements sufficient, under international law, to sustain conclusively the contention that the chain formed by those islands constitutes a prolongation of the national territory into the Gulf; so that the Salvadorean mainland reaches out along the line above indicated as far as Meanguerita Island and in that locality narrows the entrance to the Gulf, in the direction of Rosario Point on the Nicaraguan coast, to a width of less than ten miles, counting such miles at sixty to a degree of latitude.
>
> This Foreign Office claims that that width is less than ten miles because the measurement is verified by the scale on the best known maps of El Salvador, Honduras and Nicaragua. Those maps show that the width of the Gulf's mouth proper is at most thirty-five kilometers, which, at one kilometer to 0.539 (five hundred and thirty-nine thousandths) of a nautical mile, equaling one-sixtieth of a degree of latitude, are equivalent to eighteen miles and eight hundred and sixty-five thousandths (18.865) of a mile (Lloyd's Calendar for 1916, page 213, on "Nautical Measures"); that the width of the entrance between Meanguerita Island and Rosario Point, at its widest, is only half or less than half that distance, that is, nine miles

and four hundred and thirty-two thousandths (9.432) of a mile; that the latter width is cut by the sand banks (the Farallones) that form a prolongation of Nicaraguan territory and in reality reduce that entrance to a much smaller number of miles.

(*f*) And, finally, the complaint makes an exhaustive examination of the doctrine that is maintained by the scientific authors and associations and which upholds the ownership exercised by States over the sea and bays, beginning with the rule laid down by Bynkerschoek whose general maxim, "*imperium terræ feniri ubi finitur armorum vis*" is traced through its historical evolution.

IV. Caption III maintains the proposition that "The treaty violates primordial interests of El Salvador as a Central American State" and goes on to say that in the political Constitution of El Salvador, like those of the other Central American States, the principle is consecrated that those Republics are disintegrated parts of the Republic of the Center of America and that, as such, the power remains inherent in each to concur with all or any of the Central American States in the organization of a common national government; that the Constitution of Nicaragua, although in its second article it provides that the public capital powers may not enter into pacts or treaties that are opposed to the independence and integrity of the nation or which in any way affect its sovereignty, excludes from that rule pacts or treaties that "tend toward union with one or more of the Republics of Central America." The high party complainant continues, under the caption above quoted:

Alienations of territory by a Central American State to a foreign nation result, therefore, in impairing the transcendental interests that the Salvadorean people have always held, and still hold, constantly in mind as one of their greatest and most legitimate aspirations: that of the reconstitution, undiminished, with the brother peoples, of the great country that was once the master of the ancient Central American domain — an aspiration towards which the five States are impelled by their common origin, religion and history. Such alienations would deeply wound that aspiration and detract from the efficacy of the great interests that the Salvadorean people, as a fractional part of the Central American people, hold to be of first importance to their national life in the future. The Nicaraguan people and the peoples of the other three States recognize, maintain and value those interests in the same measure. This is shown by the multitude of historic facts and political acts of their independent lives, among which may be mentioned those that gave rise to the negotiation of the conventions that were concluded at Washington in 1907. One of those conventions was the pact that instituted the Honorable Tribunal before which, through the medium of the Salvadorean Government, represented by this Foreign Office, one of those peoples, is now appearing in quest of justice, to wit, the people of El Salvador.

V. Caption IV deals with the proposition that "The treaty is contrary to Article II of the General Convention of Peace and Amity subscribed by the Republics of Central America at Washington on the twentieth of December, 1907." In that chapter the complainant argues that the text of said article imposes upon the States the agreement not to alter in any form their constitutional order, because any alteration of that order was conceived by the delegates to the treaty convention to be a menace to the peace and security of each of the States they represented, and of Central America in general, and to be contrary to their established policy and to the prestige with which they ought to surround themselves — this for the purpose of warding off, for the future, every danger that could threaten the peace of Central America; that, with those ideas in mind, they could not be oblivious to the greatest danger of all, which was the possible change of the constitutional order, by which must be understood, not only the form of government adopted by the fundamental law of each State, but all standards adopted by the constituent assemblies whereby the public powers must model their acts of government in matters of primordial interest; and that national sovereignty, independence and integrity are matters that are found, in this sense, ranged in culminating rank.

VI. Caption V maintains the following proposition: "The treaty could not have been validly concluded," and, in support thereof, cited Article 2 of the political Constitution in force in the Republic of Nicaragua, which reads as follows:

> Sovereignty is one, inalienable and imprescriptible, and resides essentially in the people, from whom the functionaries established by the Constitution and the laws derive their powers. Consequently, no pacts or treaties may be entered into that are opposed to the independence or integrity of the nation, or which in any way affect its sovereignty, save only those that tend toward unity with one or more of the Central American Republics.

The chapter continues by way of commentary:

> The text of this article constitutes a fundamental rule of government which previous political constitutions of that same Republic have adopted as the rule that the Nicaraguan people have wished to see respected by the public power.
>
> Openly and essentially is the text opposed to the stipulations of the Bryan-Chamorro Treaty, wherein the Government of Nicaragua not only cedes to the United States a zone of Nicaraguan soil for the construction therethrough of an interoceanic canal, besides the Corn Islands in the Atlantic and a portion of territory to be selected by the North American Government on the littoral of the Gulf of Fonseca, but, conformably with the amendments to Article III of the treaty, made

by the United States Senate in its ratification resolution, restricts its sovereignty in fiscal and financial matters.

Those stipulations, therefore, are absolutely invalid, and for that reason cannot be carried out in face of the principles of international justice that control cases of international agreements that are fundamentally null, especially when the nation that has contracted with another whose fundamental laws are opposed to the subject-matter of the agreement has previous and full knowledge of the reasons why it is invalid and when, moreover, such agreements diminish by their invalid stipulations, the primordial rights of a third nation.

VII. In Caption VI of the complaint the high party complainant confines itself to showing: "that the Government of El Salvador sought to discuss with the Nicaraguan Government its right to oppose the effective consummation of the Bryan-Chamorro Treaty; that to that end the Salvadorean Foreign Office addressed to the Nicaraguan Foreign Office a note on that subject which was placed in the hands of the Minister of Foreign Relations of Nicaragua by special Foreign Office couriers, and that, as the note referred to has not even been acknowledged, the Government of El Salvador is forced into the position of being unable to reach a settlement with the Nicaraguan Government and of being justified in concluding that the latter has rejected any settlement of the matter."

In an additional paper, however, presented on the same date with the complaint, the high party complainant sets forth that after the signing of the complaint the answer of the Nicaraguan Foreign Office was received, and that therein, having recited the bases on which the Salvadorean Government relies in its opposition to the Bryan-Chamorro Treaty, and having set forth, in its turn, the bases considered by the Nicaraguan Government as warranting its insistence, over the protests of El Salvador, on fulfilling the treaty, the answer concludes as follows:

In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration, contained in the note itself, that the Government of El Salvador will avail itself of every means afforded it by justice, law and existing international agreements to secure the invalidation of that pact, my Government, in its turn, expresses to Your Excellency's Government its unalterable purpose to avail itself also of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement.

VIII. The complaint, which has been epitomized in the foregoing, concludes with the following formal petition and prayers:

For the reasons above set forth, the Salvadorean Foreign Office, in the name of and representing the Government of El Salvador, prays that the Government of Nicaragua be enjoined to abstain from fulfilling the Bryan-Chamorro Treaty, subscribed at Washington the fifth day of August, nineteen hundred and fourteen, and, therefore, reiterating its expressions of respect and consideration, petitions the honorable, the Central American Court of Justice:

First. — That the complaint hereby interposed be admitted and considered together with the appendices hereto attached.

Second. — That, in conformity with the text and spirit of Article XVIII of the Central American Convention concluded at Washington, herein last above cited, the appropriate decree may issue fixing the legal situation to be maintained by the Government of Nicaragua in the matter which is the subject of this complaint, in order that the things here in litigation may be preserved in the status in which they were found before the conclusion and ratification of the Bryan-Chamorro Treaty.

Third. — That, by the final decision, the Government of Nicaragua be enjoined to abstain from fulfilling the aforesaid Bryan-Chamorro Treaty, and,

Fourth. — That this honorable Court grant such other and further relief as may seem to it just and proper.

IX. The high party complainant attaches to its complaint the documents on which it relies for support. Those documents in the form of appendices, are specified in the complaint as follows:

A. Copy of protest presented on the 21st of October, 1913, by the Salvadorean Foreign Office, through the medium of the Legation at Washington, to the Department of State of the United States.

B. Reply of the Hon. W. J. Bryan, Secretary of State, relating to that protest.

C. Copy of the Salvadorean Legation's rejoinder.

Ch. Copy of the note of July 8, 1914, addressed by the Salvadorean Legation on the same subject to the Department of State.

D. Reply of the Department of State, dated July 16, 1914.

E. Copy of the note addressed on the 21st of July, 1914, by the Salvadorean Legation to the Department of State referring to its answer of the 16th of the same month.

F. Copy of the Salvadorean Legation's note of December 21, 1914, to the Salvadorean Foreign Office, transmitting the Bryan-Chamorro Treaty which had been handed to it by the Secretary of State of the United States.

G. Note of the Hon. William J. Bryan to the Salvadorean Legation transmitting copy of the above-mentioned treaty.

H. The Bryan-Chamorro Treaty.

I. Note of protest relating to said treaty, addressed on the 9th of February, 1916, through the medium of the Salvadorean Legation, to the Department of State.

J. Note of the United States Legation, dated the 19th of

February, 1916, wherein, under instructions from the Department of State, the Minister informs the Salvadorean Foreign Office that the said Bryan-Chamorro Treaty had been ratified, with amendments by the United States Senate.

K. Copy of the Salvadorean Foreign Office's reply, dated March 3, 1916, wherein it protests against the ratification of the said treaty.

L. Copy of the note addressed by the Salvadorean Foreign Office to the Nicaraguan Foreign Office on the 14th of April, 1916, and delivered by Foreign Office Couriers, Captain José A. Menéndez and Lieutenant Santiago Ch. Jáuregui.

Ll. Copy of the telegrams addressed from Managua to the Salvadorean Foreign Office on the 4th of May, 1916, by His Excellency the Minister of Foreign Relations of Nicaragua and by the Foreign Office Courier, Captain J. A. Menéndez.

M. Copy of certain paragraphs of the report for the year 1914 presented to the National Congress of Nicaragua by His Excellency the Minister of Foreign Relations of that Republic.

N. Copy of certain articles of the Law of Navigation and Marine in force in El Salvador.

O. Technical report of Civil Engineers, Don Santiago I. Barbarena and Don José E. Alcaine, relating to the Gulf of Fonseca.

P. Map of the Gulf of Fonseca.

Chapter II

ANSWER TO THE COMPLAINT AND PROCEEDINGS IN THE CASE

It appears:

That the Court, by resolution adopted on the sixth of last September and communicated to the high parties and to the other Central American Governments, admitted the complaint herein, basing its action on the consideration that the signatory nations to the Conventions of Washington, in entering into the solemn agreement to submit to this Court all controversies or questions that might arise among them, whatever might be their nature and origin, established, in Article I of the respective convention, the jurisdiction and competency of this Court in such controversies, and imposed no other limitation than the requirement to seek first a settlement between the respective departments of foreign affairs of the Governments in controversy; that in view of the terms set forth in the answer of the Department of Foreign Relations of Nicaragua to the note of His Excellency the Minister of Foreign Relations of El Salvador, the Court is of the opinion that such

previous settlement was impossible, and that, therefore, the complaint comes properly under the jurisdictional power of the Court; wherefore, the Court rendered a preliminary decision in which it was ordered: that the complaint be admitted, that the evidence presented therewith be made a part of the record in the case, that the complaint be communicated to the defendant Government in due legal form, with notice to present its case and submit its evidence within the period of sixty days, and, finally, that, pending the final decision herein, the high parties remain in the same legal status that subsisted between them, prior to the conclusion of the Bryan-Chamorro Treaty.

That, during the period allowed within which to answer the complaint, the high party complainant, through the medium of the Chargé d'Affaires of El Salvador in this Republic (Costa Rica), and pending official confirmation by the Court, amplified the prayers contained in its complaint, by supplemental petitions of September 30, and October 2, 1916, in which, after restating its first prayers, the following points were added to its complaint and judgment asked thereon:

A. That the Bryan-Chamorro Treaty violates the rights of El Salvador in the Gulf of Fonseca;

B. That the said treaty also violates the rights resulting to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity, concluded at Washington by the Central American Republics, by reason of the fact that no express and special reservation of those rights was made in said first-named pact;

C. That the Bryan-Chamorro Treaty violates the rights of El Salvador in the Gulf of Fonseca, because the grant therein to the United States, of a naval station in those waters, by its very nature, necessarily compromises the national security of El Salvador, and, at the same time, nullifies the rights of coöwnership, possessed by El Salvador in the said Gulf; and that, without the intervention and consent of that country, the Government of Nicaragua was without power legally to make that grant;

Ch. That the aforesaid grant and the lease of Great Corn Island and Little Corn Island to be held subject to the laws and exclusive sovereignty of the United States, are acts in violation of Article II of the General Treaty of Peace and Amity that was concluded by the plenipotentiaries of the Central American Republics at Washington; and

D. That the Government of Nicaragua be declared to be under the obligation to restore and maintain, in all respects and in all matters heretofore indicated, the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty.

It appears:

That the Court, by resolution adopted on the 2d day of the same month of October, admitted the petitions referred to as integral parts of the complaint, on the ground that because the Government of Nicaragua did not answer the complaint brought herein by the Government of El Salvador, it was proper to admit amplifications thereof in obedience to the universal rules of legal procedure; and it thereupon ordered that a new period of sixty days be allowed to run, within which to answer the complaint and its amplifications;

That, although notified of the above action, the high party defendant did not avail itself of the period granted; whereupon, in conformity with Article XV of the respective convention, and on the request of the attorney representing the high party complainant, the Court issued an order requiring the defendant Government to present its answer within a further period of twenty days;

That, before the expiration of the last-mentioned period, the Government of Nicaragua made its appearance in the case through the medium of its attorney, Dr. Don Manuel Pasos Arana; and, having been notified that said time limit was running against his Government, that gentleman, on the 6th of February, 1917, presented for the consideration of the Court a waiver of the time limitation together with the evidence he believed to be pertinent.

It appears:

That counsel for the high party defendant, before analyzing the arguments on which the Government of El Salvador relied in support of its complaint, protested that it was not his intention to answer the said complaint in its entirety, nor to acknowledge in any manner that the Central American Court of Justice had acquired jurisdiction to decide the case; and that, thereupon, under special captions, he made the following observations:

The Bryan-Chamorro Treaty does not place in danger the national security of El Salvador, nor does the establishment of an American naval base in the Gulf of Fonseca constitute a serious menace to its free and autonomous life, because, in order to maintain the contrary, it would be necessary to show that American influence in the republics of this continent, or even in the Central American Republics, was initiated — or commenced to reveal itself — by virtue of the Bryan-Chamorro Treaty, for history demonstrates that that influence, already long-existent therein, has not proven to have been an obstacle to the

enjoyment by those Republics of their full national life; there are even cases in which that influence has been beneficient.

Furthermore, says Nicaragua's counsel, the security and maintenance of the naval station does not involve, necessarily, the operation of the influence of the States bordering on the Gulf. That security and maintenance will depend upon other causes, such, for instance, as engineering work, war material stored, and the number of troops that may be needed to guard the station. "Force protects itself by force."

Such naval station would be, moreover, a guarantee of the independence of the Central American countries, since that independence, from the time of the break with Spain, has been guaranteed by the United States Government under the Monroe Doctrine, which makes it the defender and guardian of the continent; and the geographical situation of the Republic of Nicaragua, the possession of the Great Lake of Nicaragua and the rapid-strewn river of San Juan, which latter are to be combined for the construction of an interoceanic way of communication, place that Republic in an exceptional and different position from the other Republics of Central America, and make it subject to different criteria.

Counsel goes on to combat the argument of the high party complainant that the case of the naval station in the Gulf of Fonseca is similar to the Agadir case, which, he points out, concerned great military Powers involved in important rivalries in commerce and territorial expansion, whereas, with respect to the United States and the small countries adjacent to the Gulf of Fonseca, it is to be presumed that such rivalries and friction do not exist, and for many centuries will not exist.

Similar comment is made in reference to the case of Magdalena Bay, wherein, says counsel, were involved certain subjects of Japan, a military and naval Power of the first class, that might have established in that bay a naval station that would have been a menace to the communications and security of the United States or any other nation on this continent.

In regard to the argument that the Bryan-Chamorro Treaty ignores and violates the rights of El Salvador in the Gulf of Fonseca, counsel for Nicaragua refers to the reply on that point made by the Nicaraguan Foreign Office to the note addressed by the Salvadorean Foreign Office on the subject of the negotiation of the Bryan-Chamorro Treaty; and he adds certain other observations as follows:

He declares that the Government of Nicaragua understands perfectly that the ancient Spanish Provinces of Nicaragua, Honduras and El Salvador, by reason of the fact that they are adjacent, are owners of the Gulf in the sense that to each belongs a part thereof, but not in the sense that, thereby, a community in the legal acceptation of the word exists among those republics. Demarcation of frontiers therein is lacking; but this, he says, does not result in common ownership.

Counsel proceeds to argue that Nicaragua is not co-riparian with El Salvador in the Gulf of Fonseca, because the indispensable element of adjacency is absent. The States that are truly co-riparian, he continues, are Nicaragua with Honduras and Honduras with El Salvador, between which the status of being co-boundary States does exist.

In support of his argument, counsel invokes the boundary treaty entered into by the Republics of Nicaragua and Honduras in the year 1900. In that treaty Nicaragua takes the attitude of being in full exercise of her sovereignty, undisputed by any neighbor, over the portion of the waters that correspond to her in the Gulf of Fonseca. So, also, he invokes the attempt made by El Salvador, in 1884, to negotiate a boundary convention fixing the maritime boundary between El Salvador and Honduras; and, although that convention was not carried into effect, because of the failure of the Honduran Congress to approve it, all of its moral force, he says, detracts from El Salvador's present argument, because, for the conclusion of that treaty, the intervention and consent of Nicaragua was not asked — the very same point that is now made by El Salvador, in her own favor, with respect to the conclusion of the Bryan-Chamorro Treaty.

Those declarations are reënforced by citing the protest of the Honduran Government, a copy of which is before this Court, and which is discussed by counsel in a special section of his brief.

Counsel for the defendant Government understands, he says, that the lines of demarcation in the Gulf between Nicaragua and Honduras are actually traced, whereas those between El Salvador and Honduras are not; whereupon he makes the following statement of his understanding on this point:

> The Government of Nicaragua is not inconvenienced by the claim that the Gulf of Fonseca is a bay that should be considered as being under the exclusive ownership of the three adjacent States thereto, for this does not indicate that such ownership by the three States constitutes a community: exclusive ownership over the Gulf, and nothing more, belongs to the Republics of Nicaragua, Honduras and

El Salvador in the maritime territorial parts that belong to them as owners of their respective coasts.

In his brief counsel makes lengthy legal argument as to the reasons set forth in the complaint in favor of coöwnership; but a résumé of that argument by the high party defendant is contained in the following paragraphs:

> The Government of Nicaragua does not dispute, or cast doubt upon, the perfectly evident fact that the Bay of Fonseca is a closed or territorial bay; but it does deny that that characteristic attaches to it by reason of the fact that the three States adjacent to the Gulf, Nicaragua, Honduras and El Salvador, formerly belonged to a single international political entity, for, besides the fact that the said States preserved their autonomy, independence and even sovereignty whilst in the federation, the true reason underlying that characteristic is that the Gulf of Fonseca is *small in extent*, and, therefore, belongs to the nations that own its coasts.
>
> The Government of Nicaragua understands perfectly that *imperium* may be exercised by the States independently of ownership and *absolute jurisdiction* over the sea, this in order that its economic laws may not be evaded in a zone as great as four leagues; but maintains that that right may only be exercised directly opposite along and coextensive with the coast of a nation over the high seas and not to the right or left over portions of the territorial waters of other nations adjacent on those sides; for the insurmountable barrier of foreign sovereignties stands in the way.

The argument that the Bryan-Chamorro Treaty violates primordial interests of El Salvador as a Central American State, is denied in the answer to the complaint, on the following grounds:

That El Salvador, like Nicaragua, Guatemala, Honduras and Costa Rica, is a free, independent and sovereign State; that the circumstance that those States were members of the Federal Republic of the Center of America does not diminish or alter the rights of sovereignty that pertain to them as a result of their reorganization as separate States; that the declarations contained in the various constitutions that now control, or have controlled, the Republics of Central America, with regard to the reconstruction of the old Federation, imply no more than the *possibility* of a return to the union — never an irrevocable obligation; that the Bryan-Chamorro Treaty is not contrary to Article II of the General Treaty of Peace and Amity concluded at Washington on the 20th of December, 1907, because it is not true that the five Central American States agreed not to alter in any form their constitutional order; that what they did agree to was to do nothing that would operate in any of them to the prejudice of the constitutional order.

In support of this argument, various observations are made and the following conclusion is reached:

> The high party complainant only enunciates, but does not prove, the strange doctrine that the expression *constitutional order* must apply to every rule adopted by the Constituent Assemblies whereon the public powers might model their act in matters of primordial interest.

The answer then proceeds to interpret Article II of the treaty referred to in the following manner:

> The dispositions or measures that are prohibited by the article cited are not such as are TAKEN BY THE SIGNATORY GOVERNMENTS WITH RESPECT TO THEMSELVES, but are direct dispositions, or measures, which, independently of one of the signatory Governments, operate to alter the constitutional order in ANY OF THE OTHER REPUBLICS.

It maintains that the nullity of the Bryan-Chamorro Treaty cannot be properly alleged, because the exclusive power to do so resides in the parties who negotiated that pact, or those who possessed the right to join therein; that the signatory parties to the treaty are Nicaragua and the United States of America, and that El Salvador did not possess the right to intervene in its negotiation, since Nicaragua, an independent, free and sovereign republic, is not subordinated, by any international agreement, either to that republic or to any other on earth.

The answer goes on to contest the bases underlying the additions to the complaint presented in the documents of September 30, and October 2, last, and announces that this Court may not take cognizance of the complaint interposed by the Government of El Salvador, for the reason that the present controversy does not involve a question purely Central American, but, rather, a mixed question that depends upon the rights of a third nation, which did not previously submit to the authority of this Court by means of the special convention provided for in Article IV of the organic pact; and in support of that argument, the answer invokes the document contained in the last conducive premise ("*considerando*") of the decision rendered by this Court in the action brought by the Government of Costa Rica against that of Nicaragua arising out of the concession by the latter Government to the United States for the construction of an interoceanic canal by way of the San Juan River, or any other route through Nicaraguan territory.

In conclusion, the high party defendant, through its counsel, makes the following exceptions:

First. — That the controversy between the Foreign Offices, on the subject, was not exhausted, because "the Government of the Republic of El Salvador, having chosen, in presenting its complaint, to ask that the decision be rendered on a new claim — a claim that had not been discussed between the respective Foreign Offices — it is obvious that in that case it cannot be truly stated that an agreement could not be reached"; and,

Second. — That the Court is incompetent, for lack of jurisdiction, to take cognizance of, and decide, the complaint and the additions thereto presented by the Government of El Salvador.

The evidence adduced by the high party defendant, and attached to its answer, comprises:

A. Note of the Nicaraguan Foreign Office of July 26, 1916, in reply to the note addressed to it by the Salvadorean Foreign Office relating to the conclusion of the Bryan-Chamorro Treaty;

B. A royal *cédula* (decree) addressed to Diego Gutiérrez referring to territorial boundaries during the colonial period; and,

C. Documents relating to the attempt made in 1901 by the Governments of Nicaragua and the United States looking to the alienation of the canal route across Nicaraguan territory.

It appears: that the Court, by resolution of February 9th, of the present year, held that the time limit granted to the Nicaraguan Government within which to answer the complaint and the additions thereto had expired, and declared that the case was ready for hearing; it then fixed the 19th of February as the day on which the final arguments of the high parties were to be heard.

It appears: that, at the public hearing called as above stated, Dr. Don Alonso Reyes Guerra, for the high party complainant, and Dr. Don Manuel Pasos Arana, for the high party defendant, appeared and argued at length their respective claims.

It appears: that, at the session held by this Court on the first and second days of the present month, the questions submitted were fully discussed, and the points contained in the questionnaire (statement of issues) heretofore approved were voted upon in the manner set forth in the act passed at that session, which act reads as follows:

ACT RECORDING THE VOTES OF THE COURT IN THE CASE

THE CENTRAL AMERICAN COURT OF JUSTICE, San José de Costa Rica, at 5 o'clock in the afternoon of the 2d of March, nineteen hundred and seventeen.

The Court, having concluded its deliberations preparatory to a final decision of the suit brought by the Government of El Salvador against the Government of Nicaragua, proceeded to take a vote on each of the twenty-four points comprised in the questionnaire heretofore approved, with the following result:

First Question. — Shall the Court proceed to take cognizance of the peremptory exception to its competency for lack of jurisdiction (submitted by the high party defendant on the expiration of the time limit running against it), in so far as that exception relates to the original complaint, notwithstanding the Court admitted that complaint by act of September 6, nineteen hundred and sixteen?

Answered in the affirmative by all the judges.

Second Question. — Is the Court competent to take cognizance of the case on the issues presented?

Answered in the affirmative by all of the judges, Judge Gutiérrez Navas adding: "in so far as relates exclusively to the Republics of Nicaragua and El Salvador.

Third Question. — In view of the fact that the case involves contractual interests of a third nation that is not a party thereto, and that is not subject to the jurisdiction of the Court, has this Court jurisdiction to render a decision therein with reference to the rights in controversy between El Salvador and Nicaragua?

Answered in the affirmative by all the Judges, Judge Gutiérrez Navas adding the same proviso that appears in the answer to the preceding question.

Fourth Question. — Do the additions to the complaint, dated the 30th of September and 2d of October, nineteen hundred and sixteen, contain matter extraneous to the origin of the diplomatic controversy that preceded the litigation?

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the affirmative by Judge Gutiérrez Navas.

Fifth Question. — Referring to the answers to the preceding question, and the findings in the acts of the Court herein, was the Salvadorean Government under the obligation previously to seek a diplomatic settlement with the Government of Nicaragua on the concrete points set forth in the additions to the complaint?

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the affirmative by Judge Gutiérrez Navas.

Sixth Question. — Is the Court competent to take cognizance of and decide the prayers contained in the additions to the complaint above referred to?

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventh Question. — Is the Court competent to take cognizance of, and declare the law with respect to, the initial petition in the complaint?

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, on the ground that such cognizance is for the purpose of establishing the legal relations between the high parties litigant; Judge Gutiérrez Navas answered in the negative on the ground that he regarded it as legally impossible to prohibit the ful-

fillment of a contract without affecting the rights of one of the contracting parties that is not a party to the suit; and Judge Bocanegra answered in the affirmative, on the ground that such cognizance is for the purpose of declaring the legal relations that exist between the contending Central American States, but not for the purpose of deciding anything that affects third parties that are not parties to the suit.

Eighth Question. — As a consequence, should the exceptions proposed by the high party defendant be accepted or rejected?

Judges Medal, Oreamuno and Castro Ramírez answered that they should be rejected; Judge Gutiérrez Navas answered that they should be accepted; and Judge Bocanegra answered that the Court should accept the exceptions proposed in so far as they relate to the concluding part of the answer made by him to the Seventh Question, and that the rest thereof should be rejected.

Ninth Question. — Taking into consideration the geographic and historic conditions, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the international legal status of that Gulf?

The judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.

Tenth Question. — As to which of those characteristics are the high parties litigant in accord?

The judges answered unanimously that the parties are agreed that the Gulf is a closed sea.

Eleventh Question. — What is the legal status of the Gulf of Fonseca in the light of the foregoing answer and the concurrence of the high parties litigant, as expressed in their arguments, with respect to ownership and the incidents derived therefrom?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the legal status of the Gulf of Fonseca, according to the terms of the question, is that of property belonging to the three countries that surround it; and Judge Gutiérrez Navas answered that the ownership of the Gulf of Fonseca belongs, respectively, to the three riparian countries in proportion.

Twelfth Question. — Are the high parties litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf of Fonseca?

The judges answered unanimously that the high parties are agreed that the waters which form the entrance to the Gulf intermingle.

Thirteenth Question. — What direction should the maritime inspection zone follow with respect to the coasts of the countries that surround the Gulf?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the zone should follow the contours of the respective coasts, as well within as outside the Gulf; and Judge Gutiérrez Navas that, with respect to the Gulf of Fonseca, the radius of a marine league zone of territorial sea should be measured from a line drawn across the bay at the narrowest part of the entrance towards the high seas, and the zone of inspection extends three leagues more in the same direction.

Fourteenth Question. — Does the right of coöwnership exist between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that such right of co-ownership does exist, without prejudice, however, to the rights that belong to Honduras in those non-littoral waters; Judge Gutiérrez Navas answered in the negative.

Fifteenth Question. — Wherefore, as a consequence, and conformably with their internal laws and with international law, should there be excepted from the community of interest or coöwnership the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands respectively, and in which they have exercised, and may exercise, their exclusive sovereignty?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez; and in the negative by Judge Gutiérrez Navas, on the ground that in the interior of closed gulfs or bays there is no littoral zone; Judge Bocanegra answered in the affirmative on the ground that the high parties litigant, having accepted the Gulf of Fonseca as a closed bay, the existence of the marine league of exclusive ownership becomes necessary, since the Gulf belongs to three nations instead of one.

Sixteenth Question. — Did the Government of Nicaragua, in granting the concessions contained in the Bryan-Chamorro Treaty for the establishment of a naval base, violate the right of coöwnership possessed by El Salvador in the Gulf of Fonseca?

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventeenth Question. — Does the establishment, in the Gulf of Fonseca, of a naval base, by reason of its nature and transcendental importance, compromise the security of El Salvador?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, on the ground of the possible risk of aggression against the naval base on the part of other Powers with which the concessionary Power might in the future be at war.

Eighteenth Question. — Are the concessions for a naval base in the Gulf of Fonseca and the lease of Great Corn Island and Little Corn Island, that were granted by Nicaragua, and that placed certain waters and territory of Nicaragua under the laws and sovereignty of a foreign nation, acts that violate Article II of the General Treaty of Peace and Amity concluded at Washington by the Central American Republics?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, but on the ground that the change here contemplated affects not only the State wherein it operates, but also the other countries signatory to the treaty referred to in the question.

Nineteenth Question. — Can it be legally declared that the Bryan-Chamorro Treaty violates primordial interests of El Salvador as a Central American State?

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, in so far as relates to the aspirations consecrated by their respective political constitutions and the purview of Central American public law regarding the reconstruction of the old Federal Republic of the Center of America. Judge Gutiérrez Navas answered in the negative. Judge Bocanegra answered that such declaration may not properly be made, because it refers to interests pertaining to the future and possessed of a moral and political character, the judicial determination of which is impossible on the part of the Court at this time.

Twentieth Question. — Was the intervention and consent of the Republic of El Salvador necessary to the Government of Nicaragua in order that the latter might validly grant the concession for a naval base in the Gulf of Fonseca?

Judges Medal, Oreamuno and Castro Ramírez answered that the intervention and consent of the Government of El Salvador were necessary to the Government of Nicaragua for the concession of a naval base; Judge Gutiérrez Navas answered in the negative; and Judge Bocanegra answered that, in view of the fact that the question of nullity is not involved in this action, the word "validly" should be eliminated from the question and that, therefore, he eliminates the word from his answer, which is affirmative.

Twenty-first Question. — Has the Government of Nicaragua, by its conclusion of the Bryan-Chamorro Treaty, violated rights that belong to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity above mentioned?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the affirmative, and Judge Gutiérrez Navas in the negative.

Twenty-second Question. — Is the defendant Government under the obligation, in conformity with the principles of international law, to reëstablish and maintain the legal status that existed between El Salvador and Nicaragua prior to the conclusion of the Bryan-Chamorro Treaty respecting matters here at issue?

Judges Medal, Oreamuno and Castro Ramírez answered that in conformity with measures possible under that law, that Government is so obligated. Judge Gutiérrez Navas answered in the negative, on the ground that there has been no change in the legal status; and Judge Bocanegra answered that in his opinion the Nicaraguan Government is under the obligation to make such reparation as may be possible in conformity with the principles of international law.

Twenty-third Question. — Can the Court enjoin the Government of Nicaragua to abstain from fulfilling the Bryan-Chamorro Treaty, as prayed by the high party complainant?

Judges Medal, Oreamuno and Castro Ramírez answered in the negative, on the ground that one of the high parties signatory to the Bryan-Chamorro Treaty is not subject to the jurisdiction of the Court; Judges Gutiérrez Navas and Bocanegra answered in the negative.

Twenty-fourth Question. — Will the Court grant such other and further relief in this case as is asked for in the fourth prayer of the main complaint?

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the negative, on the ground that no such further relief has been expressly prayed for and argued in the case. Judge Gutiérrez Navas answered in the negative.

WHEREFORE the Court declares:

First. — That it is competent to take cognizance of and decide the present case brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua.

Second. — That the exceptions interposed by the high party defendant must be denied.

Third. — That the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of coöwnership in the waters of said Gulf in the manner, and within the limitations, specified in the foregoing act recording the votes of the Court.

Fourth. — That said treaty violates Article II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven.

Fifth. — That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to reëstablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action.

Sixth. — That the Court refrains from making any pronouncement with respect to the third prayer of the original complaint.

Seventh. — That, with respect to the fourth prayer of the original complaint, the Court takes no action.

ANGEL M. BOCANEGRA,
DANIEL GUTIÉRREZ N. (NAVAS),
MANUEL CASTRO RAMÍREZ,
NICOLÁS OREAMUNO,
SATURNINO MEDAL,
MANUEL ECHEVERRÍA,
Secretary.

It appears in conclusion: that, during the course of the present action, the Department of Foreign Relations of the Republic of Honduras brought to the attention of this Court a copy of a communication it had addressed, by way of protest and for the safeguarding of its rights, on the thirtieth of September of last year, to the Ministry of Foreign Relations of the Republic of El Salvador against the text of the Salvadorean complaint that alleges coöwnership in the Gulf of Fonseca; which communication went on to declare that the Government of Honduras has not recognized the status of coöwnership with El Salvador, nor with any other republic, in the waters belonging to it in the Gulf of Fonseca. That communication was, by resolution of the Court, transcribed and sent to the high parties litigant, and in due course replies were received, from their respective Foreign Offices.

SECOND PART

EXAMINATION OF FACTS AND LAW

CHAPTER I

CONCERNING THE PEREMPTORY EXCEPTION AS TO THE COMPETENCY OF THE COURT

Whereas: The high party defendant bases its exception to the competency of the Court because of lack of jurisdiction on two grounds of very distinct import, to wit, first: "The Government of El Salvador, in preparing its complaint, chose to ask for a decision on a new claim that had not been argued between the respective foreign offices, and thus cannot correctly say, in regard thereto, that a settlement could not be reached; wherefore, diplomatic channels not having been exhausted in an effort towards settlement thereof, the complaint cannot properly be admitted"; and, second: The Court is without jurisdiction to decide *mixed* controversies or questions such as those with which Central American nations may concern themselves in connection with interests of a Power foreign to Central America.

Article I of the convention that created the Court confers on it the amplest jurisdiction over those controversies that may arise between Central American Governments, wherein "the respective Departments of Foreign Affairs may not be able to reach an understanding." And it appears from the documents filed in the case by both high parties, that the Governments of El Salvador and Nicaragua not only had recourse to argument between their respective Foreign Offices, but exhausted that means of settlement by their notes of April 14, and July 26, 1916, wherein the two Governments contemplated the conclusion of the Bryan-Chamorro Treaty in all its many aspects, both legal and moral, and the Government of Nicaragua reached the following conclusion, which is incompatible with any idea of amicable settlement:

> In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration contained in the note itself that the Government of El Salvador will avail itself of every means afforded to it by justice, law and existing international agreements to secure invalidation of that pact, my Government,

in its turn, expresses to Your Excellency's Government its unalterable purpose also to avail itself of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement.

The argument that the efforts towards settlement were made solely in connection with the additions to the complaint is futile, for those additions do not involve a new dispute or controversy; they constitute perfectly germane amplifications of the Salvadorean claims that were fully set forth, in the note of the Foreign Office of that country, not only without reservation as to concrete points or subject-matter, but as an appeal to the cordial friendship of the Nicaraguan Government for the purpose of dissuading it from consummating the Bryan-Chamorro Treaty — which, the note pleads, "will seriously injure the primordial interests, not alone of this Republic, but of all Central America." And it is clear that since, through diplomatic channels, efforts were resorted to that were directed against the entire legal structure of the Bryan-Chamorro Treaty, the complainant Government was justified in confining the petition contained in its complaint to such, or any of the matters in controversy, and this, without prejudice to its right — universally conceded to every plaintiff, by the laws of procedure — to amplify its prayers before the answer to the complaint brings about the quasi-contractual status of *lis pendens;* provided, of course, that such additional prayers relate, as is the case here, to matters concomitant with the injuries of which complaint is made by the high party complainant.

Whereas: What may be called the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation that is not subject to the authority of the Court, is also unsound in the opinion of the judges. The jurisdiction of the Court is general as to all questions or differences that arise between two or more Central American Governments, "whatever may be their nature and whatever their origin." This is the language of Article I of the convention, the natural interpretation whereof excludes every exception incompatible with any agreement for a judicial arbitration that is entered into without reservation, as is the case with the arbitration here intrusted to the Central American Court of Justice.

The circumstance that the Republic of the United States of North America has interests connected with the Republic of Nicaragua does not justify the latter in evading its obligation to submit herself to the

jurisdiction of the Court, which is here called upon to adjust the legal situation between two countries signatory to the Treaties of Washington, even though its jurisdictional power does not extend to a third nation the interests of which have not been controverted, and could not be controverted, without special agreement on her part.

The absolute competency of the Court is guaranteed by the fact that the Bryan-Chamorro Treaty relates immediately to the legal order created in Central America, and contracts exclusively respecting property located in Central America over which it is natural that this international court of justice should be the only authority called upon to settle controversies between two or more States arising out of an action that may be called *real*.

In carrying out its mission, it is enough that the Court shall confine itself within the scope of its peculiar power and render a decision embracing solely the rights in litigation between El Salvador and Nicaragua; for, by accepting the argument of the high party defendant, many questions that might arise among or between Central American Governments would be excluded from its cognizance and decision if weight be given to the trivial argument that a third nation foreign to the institutional system created by the Treaties of Washington possesses interests connected with the matters or questions in controversy.

To admit that argument would be to render almost negligible the judicial power of the Court, since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission, which, according to the treaty, is indispensable to the object of "efficaciously guaranteeing the rights of the signatory parties and maintaining unalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force." Questions of transcendental importance, having their origin in treaties entered into by a Central American Government with a foreign government would be excluded from the cognizance of the Court even though something might be stipulated therein that in concrete form might menace, violate, or imply violation of, the fundamental rights of the States or of the treaty rights that reciprocally have been conceded by the nations of the Central American isthmus. That restriction, according to the unanimous consensus of the judges' opinions, cannot be accepted by the Court because it would violate the letter and spirit of the treaty creating this Court and would constitute a germ of conflicts that might perhaps engender consequences that would be painful.

On the other hand, Article XXII of the convention confers on the Court the power to determine its competency by interpreting treaties and conventions pertinent to the matter in dispute and by applying the principles of international law — a high prerogative which, to the end that once the *potestas judicandi* is decreed, the obligatory character of its decision may not be denied, removes from the field of free arbitrament among the signatory nations the right to decide as to the competency of the Court.

By virtue of the foregoing considerations, the Court hereby declares its competency to take cognizance of and decide the action brought by the Government of El Salvador which falls within the letter and spirit of Article I of the convention referred to: providing for full judicial arbitration, without restriction as to justiciable subject-matter.

Chapter II

ANALYSIS OF THE ACTION

The Legal Status of the Gulf of Fonseca

Whereas: In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.

The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion — from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821 — then under the Federal Republic of the Center of America, which in that year attained its independence and sovereignty down to 1839; and, subsequently, on the dissolution of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defense, both the Gulf and its archipelago, which nature had indented in that important part of the continent, in the form of a gullet.

During these three periods of the political history of Central America, the representative authorities have notoriously affirmed their peace-

ful ownership and possession in the Gulf; that is, without protest or contradiction by any nation whatsoever, and for its political organization and for police purposes, have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations. A secular possession such as that of the Gulf, could only have been maintained by the acquiescence of the family of nations; and in the case here at issue it is not that the *consensus gentium* is deduced from a merely passive attitude on the part of the nations, because the diplomatic history of certain Powers shows that for more than half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy, but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority.

Those efforts, manifested in conventions entered into with certain Governments of Central America, or by attempts of a different import on the part of agents of those Powers, had the result, finally — and for the purpose of putting an end to repeated and dangerous controversies — of crystalizing themselves in the stipulations of the Clayton-Bulwer Treaty of April 19, 1850, between the United States and Great Britain, wherein was announced reciprocally the right to construct or maintain fortifications dominating any canal across the Isthmus, or to occupy, fortify, colonize or exercise any measure of dominion over Nicaragua, Costa Rica, the Mosquito Coast or any other part of Central America. The coveted Gulf of Fonseca, then, was protected against all danger, at least down to the time of the conclusion of the Hay-Pauncefote Treaty, which abrogated the former pact.

Therefore, whatever may have been the motives that brought about the conclusion of the Clayton-Bulwer Treaty, and whether or not those motives are the subject of divergent points of view, the fact is that that pact consecrated a principle of justice — of honorable respect for the sovereignty and independence of the weak Central American nations — which should continue to serve as the rule of action in the international legal relations respecting the Gulf of Fonseca.

The locality and geographic conditions of the Gulf should be studied in the light of the following maps that the Court has had before it: a copy of the map issued by the American Admiralty (*i.e.*, the United States Hydrographic Office, see Chart No. 973), and which, in the opinion of the engineers Barberena and Alcaine, is the best map extant of this part of the Central American coast and the one that served as

the basis of the report and opinion of those engineers; the map drawn and published in 1884 by a North American naval commission under the direction of Commander E. C. Clark; the map prepared in 1838 by Captain Sir Edward Belcher of the Royal English Navy which was used by E. G. Squier in connection with his interesting work, "Notes on Central America," published in 1850, and, finally, the map published in 1909 by the engineer E. C. Fiallos. The report and opinion of the above-mentioned engineers filed with the complaint states:

> Paralleling the coast, we have traced on the Salvadorean and Nicaraguan parts that form the gullets or entrance to the Gulf, the two lines (distant twelve miles from the coast) that mark the respective limits of the zone of maritime inspection according to the generally accepted prescriptions in that connection, and it is thus clearly to be seen that those lines intercept or overlap, thus closing the Gulf, which is thereby reduced to an interior bay of purely Central American jurisdiction.
>
> We have arrived at the same conclusion by merely considering that the entrance to the Gulf is 35 kilometers, approximately, from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua; and that, by measuring four marine leagues, or 22,220 meters, from each of those points, the lines traced necessarily meet and dovetail; otherwise the entrance would have to be at least 44,440 meters, or nearly 10 kilometers wider than it is.
>
> If the shortest distance between Meanguerita Island — an integral part of the Salvadorean coast — and the Peninsular of Cosigüina be taken as the points of entrance to the Gulf, the width would be 15 kilometers, which is barely equal to 8 miles; and, if the islets known as the Farallones be taken as the limit of the Nicaraguan coast on that side, the entrance would be reduced to 7 kilometers 950 meters, or some 4 miles and a little more than a quarter.

The foregoing could be reënforced from other authoritative sources, such as the Lawyers' Society of Honduras, which adopted the report of a select commission appointed to study the legal aspects of the case of the Gulf of Fonseca in relation to the Bryan-Chamorro Treaty, and which report is published in the important review of that body known as the *Foro Hondureño*, and the description given by the geographer Squier in his above-mentioned work. The report of that commission reads as follows:

> The entrance is fixed by a straight line running from Cosigüina Point, in Nicaragua, to Amapala Point, in El Salvador, a distance of 19¼ geographic miles or 35 kilometers and a fraction. Its coves or bays are those of Cosigüina, San Lorenzo and La Unión, and its principal islands are Tigre, Zacate Grande, Güegüensi, Exposición, the islets of Sirena, Verde, Violín, Garrobo, Coyote, Vaca, Pájaros, and Almejas, belonging to Honduras; Meanguera, Conchagüita, Meanguerita, Punta Zacate, Martín Pérez and other islets belonging to El Salvador, and the Farallones, belong-

ing to Nicaragua. Between El Salvador and Honduras no definitive treaty has been entered into marking out the two jurisdictions over the waters of this Gulf.

In order to arrive at the distances between the points pertinent to the present inquiry, we have taken as a basis — without prejudice, however, to other opinions — the map prepared and published in 1884 by American naval officers under the direction of Commander E. C. Clark, which agrees almost entirely with the Sonnestern map and with Nicaragua's 1905 map, published by the *Oficina Internacional Panamericana*. The map published in Honduras in 1909 by the engineer E. C. Fiallos shows certain insignificant differences from the one we have taken for our basis.

The width of the waters in the Cove of Cosigüina, on the boundary line with Nicaragua, and drawn by the Mixed Commission of 1894, is 10½ marine miles, or 19 kilometers. Half that distance is 5¼ miles, or 9.5 kilometers. From the coast to Amatillo the distance is approximately 17.5 kilometers. From Rosario Point, or Mony Penny, towards the southernmost point of Tigre Island, the distance is 11⅓ miles or 21 kilometers. From Rosario Point to Meanguerita it is 8¾ miles. From Amapala Point to Rosario Point, 19⅛ miles; half that distance is 9¾ miles. From Amapala Point to the Farallones the distance is 15⅝ miles and from those islets to Rosario Point, 6 miles. From Meanguerita to the Farallones, 15 kilometers.

The northern and eastern coasts of this Gulf belong to Honduras, and they are more than 60 geographic or marine miles in extent. The coasts that belong to Nicaragua on the south extend for 57 miles from Amatillo Point to Cosigüina Point; and the Salvadorean coasts, to the west, extend over a distance of 25 miles. There is, therefore, in the waters of the Gulf of Fonseca, an overlapping of the jurisdictions of the States of Honduras, Nicaragua and El Salvador.

The depth of water in the Gulf varies from 14 to 25 feet at the entrance. In the interior are certain points of considerable depth and others where it does not exceed three feet. The channel for deep-sea vessels runs between Meanguerita and the Cosigüina coast, although the depth of 10 to 15 feet between Meanguera and Conchagüita also permits the passage of vessels of regular draft. These are the only entrance points towards Amapala. The entrance to La Unión for deep-sea vessels is by way of the channel lying between the Conchagua coast and the Islands of Conchagüita and Punta Zacate. Outside of these routes navigation is dangerous because of shallowness and the existence of many sandbanks. The safest anchorages at present are Amapala and La Unión. San Lorenzo and Cosigüina Bays or Coves have a mean depth of 7 feet, which permits navigation by light-draft vessels only, and at the widest part of the Gulf, which lies between Tigre Island and the Real Estuary, in Nicaragua, the mean depth is from 6 to 7 feet.

And, finally, the North American geographer makes the following statement on this subject:

The Bay of Fonseca, sometimes called the Gulf of Amapala or Gulf of Conchagua, is without dispute one of the best ports — or, rather "constellation of ports" — along the entire extent of the Pacific coast of this continent. Its greatest length is 50 miles and its mean width is 30 miles.

It will be seen that this bay lies in the great longitudinal valley comprised

between the volcanic hills of the coast and the true cordillera that extends from Guatemala to Costa Rica. The entrance from the sea into the bay is nearly 18 miles between the great volcanoes of Conchagua and Cosigüina, which, like giant guardians, stand on either side as unfailing guides to mariners. On a line behind this entrance, and almost equidistant therefrom, lie the two considerable islands of Conchagüita and Meanguera and a group of rocks called the Farallones which protect the bay against the force of the ocean swells and divide the entrance into four channels of sufficient depth to admit vessels of all drafts.

The Bay of Fonseca, by reason of its admirable ports, the means it offers for the construction and repair of vessels, its productive lands and the local traffic between El Salvador, Honduras and Nicaragua, is of great value and importance commercially. But its value to us is even greater, considering its position from a political and geographical point of view and especially as the inevitable terminal, in the Pacific, of a railway between the two oceans. And I do not hesitate to repeat what I said on a former occasion to the Government of the United States when I was its representative in Central America: "The Bay of Fonseca is under every consideration the most important position on the Pacific coasts of Central America and so favored by nature that it cannot escape becoming the emporium of commerce and the center of enterprises in that part of the continent."

The foregoing descriptions give an exact idea of how vital are the interests guarded by the Gulf of Fonseca, and, if those interests are of incalculable value in making up the characteristics of an "historic bay" applicable thereto, there are other factors that determine even more clearly that legal status. These are:

A. The projected railway that Honduras began and which she will not abandon until this great aspiration of hers shall have been concluded. Over that railway will pass the interoceanic traffic that is to develop the rich and extensive regions of the country. Its terminal stations, with their wharves, etc., will be located very probably on one of the principal islands nearest the coast of the Gulf.

B. El Salvador, in her turn has under her control a railroad which, starting at the port of La Unión, follows its course through important and rich departments of the Republic to connect with lines entering from Guatemala at the Salvadorean frontier.

C. The long-projected prolongation of the Chinandega railroad to a point on the Real Estuary on the Gulf of Fonseca to expedite and make more frequent communication on that side with the interior of Nicaragua.

D. The establishment of a free port decreed by the Salvadorean Government on Meanguera Island.

E. The Gulf is surrounded by various and extensive departments of the three riparian countries. These are of great importance because they are destined to great commercial, industrial

and agricultural development; their products, like those of the departments in the interior of those States, must be exported by way of the Gulf of Fonseca, and through that Gulf must come also the increasing importations.

F. The configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws.

G. The strategic situation of the Gulf and its islands is so advantageous that the riparian States can defend their great interests therein and provide for the defense of their independence and sovereignty.

Whereas: It is clearly deducible from the facts set forth in the preceding paragraphs that the Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua; this on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit, secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defense.

Whereas: The high party defendant, in its answer and in its allegations in opposition to the points of law set up by the high party complainant in its complaint, admits the following concrete propositions:

(*a*) The Gulf of Fonseca is a closed or territorial sea because it is small in extent and, therefore, belongs to the nations that own its coasts.

(*b*) The Gulf of Fonseca is a bay owned exclusively by El Salvador, Honduras and Nicaragua; but only as to the maritime territorial part that belongs to them respectively as owners of their coasts in their respective parts.

(*c*) Although Nicaragua, Honduras and El Salvador are owners of the Gulf, in those parts that pertain to each there is no community in the legal acceptation of the word; because the mere fact that there is no demarcation of frontier lines between two or more countries does not constitute community, although such lack of demarcation may have existed during the colonial dominion or during the brief domination by the Central American Federation.

Even under the Spanish dominion territorial delimitations of the colonies were not ignored; this is shown by Appendix 2 which refers to a royal *cédula* addressed on the 11th of January, 1541, to all the governors, judges and captains of the Indies and of the islands and mainland of the ocean sea, commanding them to respect the boundaries of the Cartago Government (*Gobernación de Cartago*).

(*d*) The Government of Nicaragua recognizes that States may exercise *imperium* beyond their absolute jurisdiction over the sea, but in front of the coast over the open sea, and not to the right or left over portions of the territorial sea pertaining to other nations, for the insurmountable barrier of foreign sovereignties here arises to oppose such exercise of *imperium*. It also recognizes that the overlapping of lines traced parallel to the coasts at a distance of twelve miles respectively from the Points of Amapala and Cosigüina only demonstrates that the Gulf of Fonseca is territorial, but urges that the fact of overlapping does not give the Government of El Salvador the right to exercise its *imperium* over the parts of the Gulf itself that belong to Honduras and Nicaragua territorially.

(*e*) The jurisdictional waters of El Salvador, Honduras and Nicaragua do not merge and commingle in the Gulf itself, and, therefore, even in those waters thereof wherein the States may exercise police power and rights looking to security and defense, they may not maintain and exercise rights of sovereignty and coöwnership.

Whereas: The theory that the high party defendant accepts as the true test of the territoriality of the Gulf is one that must be examined in the light of the distances traced on the maps, because they give an idea of the real, or at least probable, extent of the Gulf. The geographer Squier fixes it approximately at 50 miles in length by 30 in width. The technical study by the engineers Barberena and Alcaine declares the existence of two zones in which, according to the law of nations and the internal laws of the riparian States, they may exercise their jurisdiction, to wit, the zone of one marine league contiguous to the coasts, wherein the jurisdiction is absolute and exclusive, and the further zone of three marine leagues, wherein they may exercise the right of *imperium* for defensive and fiscal purposes. And, in referring to the lines drawn parallel with the coast from Amapala Point, in El Salvador, and from Cosigüina Point, in Nicaragua, those engineers claim that there is an overlapping of jurisdictions in the zones of maritime inspection.

So, then, if those lines be prolonged, following the contours of the respective coasts in that expanse of waters which, like a vestibule, lead up to the other or inner and narrower entrance to the bay — *i.e.*, the

one between Meanguerita and the Cosigüina Peninsular — as far as the heights of the islands and promontories, which constitute a sort of counterfort that moderates the force of the waves entering the bay from the outer sea, the overlapping becomes more pronounced, and probably might even extend over and embrace certain parts of the adjacent three-mile territorial zone over which the riparian States enjoy exclusive ownership. The circumstance that, in that narrower entrance, the line between Meanguerita and the Cosigüina Peninsular, may be a little more than eight miles in length, or four miles and a quarter if it runs by way of the Farallones, off the Nicaraguan coast, is undoubtedly a condition characteristic of territorial seas because that entrance is susceptible of defense by the cross-fire of cannon; but, taken alone, it is not sufficient for the deduction that because of its small extent the Gulf is a territorial sea, since the merging in the maritime inspection zone, chiefly in the gullets or entrances, shows the existence of a greater expanse of water than is comprised in that zone and over which each of the States enjoys exclusive ownership.

Much less can it be said that the conception of the authorities cited (Calvo, Grotius, Vattel and others) may be applied to such considerable expanses of waters as that of the Gulf of Fonseca. The lesser of the distances as to which consideration has been given, only indicates the need of the proprietary States of the Gulf to maintain their exclusive ownership because of its strategic qualifications for defense against outside attack; and this is the more evident when the historic origin of the ownership is taken into account for the purpose of showing continuous, peaceful and undisputed use of the waters of the Gulf itself — a further capital characteristic that gives it a special legal status.

Whereas: The juridical character of the Gulf of Fonseca is subordinated to other conditions of first importance than those relating to the extent more or less great of its capacity and the narrowness of entrance; and it is in that sense that this Court has held it to belong to the category of *historic bays* and to be possessed of the characteristics of a *closed sea*, basing its opinion on what was decided as to territorial waters by the arbitral award of the Permanent Court of the Hague of September 7, 1910, and on the voluminous commentaries of the eminent jurist, Dr. Drago, one of the judges in the arbitration who rendered a separate opinion citing authorities on the point.

In fact, the award admitted the British claim that the bays referred to in the treaty with the United States which was the basis of the

controversy, are "geographic bays" irrespective of the width of their entrances; that they are "exceptions" and, according to the international writer cited, "appear in many treaties, and the doctrine expressly recognizes them." "The character of a bay," said the arbitral tribunal, "is subject to conditions that concern the interests of the territorial sovereign to a more intimate and important extent than those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry, are all vitally concerned with the control of the bays penetrating the national coast line." Dr. Drago, commenting on the award in his dissent, said:

> In what refers to bays it has been proposed as a general rule that the marginal belt of territorial waters should follow the sinuosities of the coast, so that the marginal belt being of three miles, only such bays should be held as territorial as have an entrance not wider than six miles.
>
> If the marginal belt be traced geographically along the sinuosities of the coast, it will be noted that at the point of entrance where the two lateral zones meet, there is a small triangle, or funnel-shaped figure, the delimination of which would be very difficult in actual practice. For reasons of convenience, and in order to avoid involuntary trespassing on fishing waters, many recent treaties, particularly those of Great Britain, have extended the width of the entrance to ten miles, measured between the opposite points towards the open sea.
>
> But this refers to common or ordinary bays, and not to those which, in our dissent, we have called "historic bays." As has been seen, the principle that underlies all the rules and jurisdictional distances is no other than that of paramount necessity to protect fiscal interests, persons and territory of the nation that claims sovereignty over the contiguous seas and over the gulfs, bays and coves that penetrate its coast line.
>
> From this point of view a fundamental distinction instantly becomes apparent. Not all of the entrances from the sea are of equal importance for defense, nor do they all demand the same degree of protection. Some are far from the centers of population, in places uninhabited or inaccessible and without fisheries or other exploitable wealth; and some are so intimately involved in the very vitals of a nation that any departure from full, absolute and indisputable possession thereof would be intolerable. Delaware Bay, which stands as the entrance to the great port of Philadelphia, Chesapeake Bay, which lies in a populous district of the United States, Conception Bay, in Newfoundland, from which, by an easy descent, the capital of that colony would be vulnerable — all are in that class.

Dr. Drago cites the opinions of Chancellor Kent, Secretaries of State Pickering, Buchanan and John Davis, and concludes his commentary by saying:

> The United States appear to have abandoned that exaggerated theory (referring to the doctrine of promontories). At least, in the case before us, they adhere to the

strict rule of the six-mile entrance for the generality of bays; but they except, as in necessity bound to do, their own vital bays, and cite a great collection of authorities and arguments in support of their exception. Those excepted bays appear in many treaties and the doctrine expressly recognizes them. . . . Continued use, necessities of self-defense and the will to appropriate expressly stated, must have greater weight in this case than in any other in giving effect to the theory of acquisition by prescription, and as placing historic bays in a special and separate category, wherein ownership belongs to the embracing country, which, having made the declaration of its sovereignty, has affirmed possession and incorporated them into its dominion with the acquiescence of the other nations.

And, finally, it is worthy of consideration that the Government of the United States itself, in the note addressed by the Department of State on the 18th of February, 1914, to the Minister of El Salvador at Washington said categorically:

In your protest the position is taken that the Gulf of Fonseca is a territorial bay whose waters are within the jurisdiction of the bordering States. This position the Department is not disposed to controvert.

This evidently implies an express recognition of the unequivocal claim of sovereignty set up by the three States that surround the Gulf. The Secretary of State could do no less than follow the traditional doctrine proclaimed by other representatives and statesmen of the great North American nation and apply it to the *vital bays* that indent the extensive coasts of the federal territory.

Whereas: in regard to the coöwnership in the Gulf of Fonseca claimed by the high party complainant, and in view of what is alleged on that point by the high party defendant, the question of division, demarcation or delimitation of jurisdictions between the provinces that constituted the patrimony of the Spanish Crown must be examined in the light of historical truth in order to harmonize their conclusions with the legal relations that now govern among the riparian States. A series of controversies over purely territorial boundaries demonstrates that the royal *cedulas* traced topographical lines based on the claims of the governors of the political divisions who knew little about their geographical conditions, wherefore arose many errors as to places, directions and distances. These circumstances, on the one hand, and, on the other, the secondary consideration that monarchs were not interested to prevent jurisdictional transgressions, since the patrimony of those political divisions pertained to a single proprietor or lord, resulted in the fact that the demarcations were in general confused and lacking in detail as is very properly said by counsel for Nicaragua. Proof

of this lies in the fact that in their autonomous lives the Central American countries, and even the other countries of Latin America, have found themselves under the supreme necessity to mark out and make clear their frontiers in order to preserve harmony among the sister peoples, and in the failure of his Majesty the King of Spain, Don Alfonso XIII, in rendering his arbitral award in the boundary arbitration between Honduras and Nicaragua, to give weight to the royal *cedula* because the capitulation with Diego Gutiérrez of January 11, 1541, referred to territories with which it had nothing to do, such as Honduras and Nicaragua.

With respect to the Gulf of Fonseca, it must be noted that, as no fact of first importance had disturbed the cordial harmony of the States that surround it in the use and benefits of its waters, the Governments concerned themselves solely with fixing upon portions thereof as to which the exercise of the rights of neighboring countries might involve them in conflict. Thus it was that by mixed commissions, in 1884, between El Salvador and Honduras, and, in 1900, between the latter and Nicaragua, in marking out and making clear their respective land frontiers, they reached the point of drawing divisionary lines that started from certain coves and extended to a certain point in the Gulf. The first line did not endure because the Honduran Congress rejected the convention relating to land boundaries, signed at San Miguel, in the Republic of El Salvador, on the 10th of April, 1884, on the ground, among others, that the commission exceeded its powers by extending its operations to the Gulf, a course unauthorized by the Honduran Government (Legislative Decree of 1885). The division adjusted with Nicaragua is the only one that still subsists. The line of this division appears on the maps here presented as running to a point midway between the southern part of Tigre Island and the northern part of Cosigüina Point (Mony Penny, or Rosario Point), thus leaving undivided a considerable expanse of waters belonging to the riparian States which extends as far as the Gulf's great outside entrance, which measures 35 kilometers in width.

Escriche's Dictionary of Legislation and Jurisprudence defines "community" as the quality that makes a thing common, so that any one may participate freely in its use; "common" things are those which, belonging privately to no one, belong or extend to many, all of whom enjoy the equal right to make use of them; "possession in common" is the enjoyment of or possession by two or more persons of the same

thing undivided, that is, in such way that the thing in its entirety belongs to all, none being able to specify his part.

The high party defendant recognizes that no demarcation existed among the countries adjacent to the Gulf prior to their constitution as independent entities, notwithstanding the fact that demarcations were then not unknown; but no proof whatever is adduced to show that subsequently those same States ever effected a complete division of all the waters embraced therein, for, although there was a division made with Honduras in 1900 — which has been here invoked — the line drawn, according to the map of the engineer Fiallos (who was a member of the Mixed Commission), only extends as far as a point midway between Tigre Island and Cosigüina Point, thus leaving undivided, as already stated, a considerable portion of the waters embraced between the line drawn from Amapala Point to Cosigüina Point and the terminal point of the division between Honduras and Nicaragua.

Consequently, it must be concluded that, with the exception of that part, the rest of the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua, and that, by reason of the particular configuration of the Gulf, those waters, though remaining face to face, were, as declared in the report of the engineers Baraberena and Alcaine and as recognized by the high party defendant, confounded by overlapping.

And, since it is true in principle that the absence of demarcation always results in community, it is self-evident that every community necessarily presupposes, in the legal sense, the absence of partition. This community in the Gulf has continued to exist by virtue of continued and peaceful use of it by the riparian States, and this is shown most clearly by the overlapping of jurisdictions in the zone in which both litigant countries have been exercising their rights of *imperium*, though from this it is deduced that that legal status does not exist in the three marine miles that form the littoral on the coasts of the mainland and islands which belong to the States separately and over which they exercise ownership and possession both exclusive and absolute.

Similarly, no community exists in those waters that are embraced between islands and promontories the proximity of which to each other, in the littoral zones of exclusive ownership, results in an overlapping of the jurisdictions of the States, for in that case the demarcations must result from an arrangement in conformity with the recognized principles of international law. It is, therefore, evident that the exercise

of jurisdiction in the unpartitioned waters is based on the legal nature of the Gulf, which makes them common, and in the all-important necessity to protect and defend the vital interests of commerce and industries, these being indispensable to national development and prosperity.

A change in the theory of the use of the common waters of the Gulf — which waters, because of their nature, must respond to the reciprocal needs of the adjacent States — would imply nullification of jurisdictional rights that should be exercised with strict equality and in harmony with the interests of the community. One coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common, even though advantage might result therefrom to the other coparceners, unless the consent of all is obtained. Wherefore, in the case here at issue, the concession of the naval base in the Gulf granted by the Government of Nicaragua to the United States, at such point on Nicaraguan territory as the concessionary may select (Article II of the Bryan-Chamorro Treaty), necessarily presupposing, as it does, occupation, use and enjoyment of waters in which El Salvador possesses a right of co-sovereignty, would have the practical effect of nullifying, or at least restricting, those primordial rights; because American warships in those waters, and all that depends on the naval base as well as territory, as such, and water highways, would be subject exclusively to the laws and sovereign authority of the United States (Article II of the above-mentioned treaty); in other words, the concession in question grafts a foreign Power upon a part of the continent that has been, and is, subject to the exclusive and undivided ownership of three sister nations and thus places in grave danger the vital interests that they of necessity must possess and protect for their own development.

The universal principles that govern community in things are perfectly applicable to the Gulf of Fonseca, from the international point of view. Community is not common in the relations among nations, but it is not an inconceivable or an isolated fact. "In public law," says Heffter, "there are certain acts and relations which, independently of agreements, and in a manner analogous to the quasi-contracts of civil law, produce effects similar to those arising from treaties. (3) Of an accidental community (*communio rei vel juris*), in a case wherein a country belongs at once to various states or sovereignties, or in the event of an acquisition of a thing in common over which the dispositions of the civil laws of a single country are not applicable. In

such cases recourse must be had to principles heretofore explained relating to treaties of association, which principles are: that of equality of rights and obligations, at least where a portion shall have been previously stipulated; that of free enjoyment of a thing by each coparcener with a proviso against mutual injuries; and, finally, the principle that forbids the disposal of a thing completely without the consent of the other coparceners, the power so to convey being limited to the portion corresponding to each. The dissolution of a community can only take place by means of a treaty or accidentally."

The same opinion prevails among other authorities, such as Fiore, Bluntschli, Perels, Rivier, E. Nys, and the Bolivian statesman Federico Díaz Medina, who cites the case of Prussia and Austria when, by the Treaty of Vienna of 1864, they acquired from Denmark an undivided sovereignty over the Duchies of Schleswig-Holstein, and the case of Chile and Bolivia, who, by the treaty of 1876, recognized their reciprocal and definitive territorial ownership in the 24th parallel of latitude and at the same time community of ownership in, and the right to exploit, the guano deposits lying between the 23d and 24th parallels — an agreement that was superseded by the treaty of armistice of 1884.

Also from the point of view of various civil laws, among them those of Central America, and especially those of Nicaragua, in the light whereof the question of community in the Gulf may be contemplated. Article 1700 of the Civil Code of the Republic last mentioned gives to the coparcener of a thing held in common full ownership over his part, together with its emblements and profits, including the right freely to sell, grant or mortgage, provided no right personal to another be involved. But naturally that power should be, and is in fact, limited by Article 1710, which provides:

> No coparcener may take for himself or give to a third party real estate held in common, in whole or part, in usufruct or for use, habitation or rental in the absence of agreement with the other interested parties.

A conflict of meaning is apparent here which, however, is perfectly explicable by an error of the copyist as shown by a comparison of the Nicaraguan article with Article 399 of the Civil Code of Spain, which served as a model for the former. The latter gives the same power provided in the other but prescribes that "the effect of alienation or mortgage, with respect to coöwners, shall be limited to the portion adjudicated in the partition *on the extinction of the community.*" The

article of the Nicaraguan Code omitted the complementary and conditional proviso; and proof of this lies in the fact that, in spite of providing for free disposition on the part of the coparcener, it excepts the personal rights to usufruct, use, occupation and leasing which, like all the others, are subject to the following rules of the Nicaraguan Code:

> ARTICLE 1695. — Each coparcener may make use of the things held in common, provided also that he use them for the usual purposes for which they are destined, and that such use be not against the interests of the community.
>
> ARTICLE 1698. — None of the coparceners may make any change in the thing held in common, even though such change would operate to the advantage of all, in the absence of their consent thereto.
>
> ARTICLE 1699. — The agreement of the majority of the coparceners is necessary for the administration and better enjoyment of the thing held in common.

Whereas: The high parties contestant are in accord respecting the existence of the zone of maritime inspection in the Gulf of Fonseca, wherein the States exercise the right of *imperium* beyond their *absolute* jurisdiction over the sea for purposes fiscal and for purposes of national security; but the high party defendant claims that, because an unsurmountable barrier attributable to alien sovereignty stands in the way, that right should be exercised on the high sea directly opposite the respective coasts of the several countries, and not to the right and left over portions of the territorial sea belonging to others, whereas the high party complainant claims that that zone exists as well within the Gulf as without.

The Court has admitted the latter claim because it finds that it is supported by Articles 2, 13 (first paragraph) and 16 of the Law of Navigation and Marine of the Republic of El Salvador, which read as follows:

> ARTICLE 2. — Estuaries, coves and bays and the contiguous open sea to a distance of one marine league, measured from extreme low tide, are of national ownership; but the police power, for purposes connected with the country's security and the enforcement of the fiscal laws, extends to a distance of four marine leagues, measured from extreme low tide.
>
> ARTICLE 13. — The territorial sea of the Republic is divided into five maritime departments as follows:
>
> *First.* — The Maritime Department of La Unión, comprising the Bay of Conchagua, that part of the Gulf of Fonseca wherein are situated the Salvadorean islands, and the territorial sea as far as the parallel of the eastern mouth of the San Miguel River.
>
> ARTICLE 16. — All officers exercising marine command will enforce the nation's police power over the four marine leagues mentioned in Article 2, within the limits

indicated by the prolongations of the parallels that mark out the respective departments.

From the above-quoted provision it may be deduced without effort that the zone of inspection should be measured in the same manner as the littoral marine league, that is to say, from the line of extreme low tide; and, as that league, according to the principles of law, must be measured in connection with the sinuosities of the coast, so also that zone, which is a prolongation of the former, must follow the same direction. The fact that the waters of the Gulf belong to the three States that surround them has not operated to prevent the existence of a second zone that tends to protect the rights of each State with respect to the others, under regulations, which, as the publicist, Don Andrés Bello, says, "are concerned more immediately with their prosperity and well-being"; because, considering their present political organization, the States contiguous to the Gulf possess among themselves rights and duties of reciprocal application in the use and enjoyment of the non-littoral waters, and because, the merchant vessels of all nations possessing, as they do, the right of *uso inocente* over those waters, the right of the States to exercise the police power and powers incident to national security and fiscal matters off their respective coasts is correlative to those rights. The overlapping that would result from continuing the prolongation of the lines towards the interior of the Gulf, would demonstrate the necessity of settling that collision of interests by means of treaties between the respective governments and, furthermore, the imperative necessity of avoiding an upsetting of the situation by other acts distinct from those exercised up to the present time with the reciprocal acquiescence of the coöwners of the Gulf.

And even in the contrary hypothesis — that is, assuming, as claimed by the high party defendant, that the right of *imperium* can be exercised directly off the coast only, taking for base the thirty-five kilometer line from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua, and, therefore, ignoring the question of the right of ownership in the interior of the Gulf — the fact remains that the non-littoral waters preserve the same legal status of community as among the coöwners, subject only to certain fixed restrictions in the respective laws and regulations concerning use by outsiders. That claim the Court has been unable to admit, because the obligatory character possessed by the Laws of Navigation and Marine, of El Salvador, which were

enacted to safeguard in the Gulf the rights and interests of the Republic, cannot be ignored, and because, furthermore, those laws conform to the generally admitted principles of international law in regard to the points that are the subjects of those special provisions.

Whereas: The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as coöwners of its waters, except as to the littoral marine league which is the exclusive property of each, and with regard to the coöwnership existing between the States here litigant, the Court, in voting on the fourteenth point of the questionnaire, took into account the fact that as to a portion of the non-littoral waters of the Gulf there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security, and that, as to another portion thereof, it is possible that no such overlapping and confusion takes place. The Court, therefore, has decided that as between El Salvador and Nicaragua coöwnership exists with respect to both portions, since they are both within the Gulf; with the express proviso, however, that the rights pertaining to Honduras as coparcener in those portions are not affected by that decision.

Whereas: In regard to the protest addressed by the Government of Honduras to the Government of El Salvador, copy of which has been brought to the attention of the Court in this case by his excellency the Minister of Foreign Relations of the former Government, the Court can do no less than accord to it the full effect claimed, therefore, by that high officer in his report of January 6, 1917, to the national congress of his country concerning the conduct of affairs of the foreign relations branch of the Executive power. The paragraphs that deal with this subject read as follows:

> The Government of Honduras, although it disclaimed a purpose to oppose in any manner the steps being taken by the sister Republic of El Salvador in this delicate matter, nevertheless believed it to be its duty to protest, and did protest, against the allegation of the complaint referred to, wherein coöwnership in all of the waters of the Gulf of Fonseca is claimed on the ground of the status of community among the three riparian Republics even as to the waters contiguous to the coasts and islands of Honduras, over which extends the undisputed sovereignty of the Republic as exclusive owner thereof, and in which that Republic has exercised, and now exercises, jurisdiction, as is recognized in the public documents of the Government of El Salvador itself.

The Government is of the opinion that whatever may be the ultimate conclusion as to the legal status of the Gulf of Fonseca outside the territorial waters, coöwnership over those waters by any other republic cannot be recognized without compromising the integrity of the territory which the Constitution brings under the safeguards of the Powers of the State.

As was to have been expected, the Government of El Salvador took the protest mentioned into consideration and gave to this Government frank and satisfactory evidence of its full justification, to that end accrediting thereto the Confidential Agent, Dr. Don Manuel Delgado, with whom an adjustment was signed, which, when approved by the Government of El Salvador, will put an end to the differences that have arisen and safeguard the rights of this Republic.

CHAPTER III

CONCERNING THE ESTABLISHMENT OF A NAVAL BASE

Whereas: The legal status of the Gulf of Fonseca as an *historic or vital bay*, having already been established by its historical, geographical and sociological antecedents, the Court will now proceed to examine that legal status in relation to the stipulation of the Bryan-Chamorro Treaty which refers to a naval base and which reads as follows:

ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.

The treaty, then, conveys a concession, in the form of a renewable lease, for the exploitation and maintenance of a naval base at a point on Nicaraguan territory in the Gulf of Fonseca, to be designated by the Government of the United States; and, considering the legal status of that Gulf and the extremely valuable interests possessed by El Salvador therein, it is proper here to determine whether the establish-

ment of a naval base at any point on the borders of that closed sea would menace the security of that Republic and endanger its national integrity.

A distinguishing characteristic of all closed or territorial bays is, in the opinion of the text writers, the exclusive possession enjoyed in its waters by the states that own its coasts and which is exercised for the purpose of safeguarding the rights of territorial defense and the rights that relate to their vital economic and commercial interests. The sovereigns of the territory extend the exercise of their *imperium* beyond the *maritime littoral* in such a bay and extend their protection throughout the waters comprised within the bay which nature intrusts to their moral and material domination as though those waters came under their complete ownership.

But without these circumstances, it would still be necessary to hold that the establishment of a naval base inside the Gulf would be a menace to the Republic of El Salvador, even though that base were located on the *maritime littoral* of the Republic of Nicaragua, since though the Government of that Republic may never, during its international life, have performed any official act that might have implied a menace to the Salvadorean nation.

The function of sovereignty in a state is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other states. Bluntschli tells us that "sovereignty does not imply absolute independence or absolute liberty." "States," he says, "are not absolute beings but entities whose rights are limited"; and he adds that a state may not claim more than such independence and liberty as is compatible with the necessary organization of humanity, with the independence of other states, and with the ties that bind states together. (Nys, *Le Droit International*, Vol. I, p. 380.)

This doctrine takes on added moral and legal force when applied to such Central American countries as El Salvador, Honduras and Nicaragua, because in each independence and sovereignty with respect to the Gulf of Fonseca are limited by the concurrence of rights which carries with it, as a logical postulate, a reciprocal limitation.

To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the *independence* of states which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess

the right to live and develop themselves without injury to each other; and, if those principles be deep-rooted in international life, they take on a greater importance when applied to Central American countries, which on certain occasions have incorporated those postulates as basic principles of their public law.

The Assembly of Plenipotentiaries that met at this capital [of Costa Rica] in 1906 fixed as the point of departure for the discussions that preceded the General Treaty, a solemn Declaration of Principles consecrated by the Governments as canons of Central American international public law; among these is the following: "II. — The solidarity of the interests that relate to the independence and sovereignty of Central America, considered as a single nation."

That declaration, like the others adopted at the same time, is of high moral value, because in the protocols adopted at the Conferences of Washington it appears that the stipulation of the Treaty of San José served as the cementing basis of the system of law created in the treaties there subscribed in 1907 and now in force.

A reciprocal duty is entailed upon the Governments of El Salvador and Nicaragua to guard those supreme interests which are confided to the custody of all the sister countries; for, were that not so, it would be enough for the Court, in order to declare the naval base granted in the Bryan-Chamorro Treaty to be a menace to El Salvador's security and vital interests, to take into consideration the fact that a naval base was stipulated for in the neighborhood of the Republic of El Salvador, the establishment and development of which would make necessary the use of common waters in the Gulf of Fonseca and the construction of engineering works, the accumulation of war material and the installation of barracks in places which, because of the topography of the land, would completely dominate Salvadorean territory.

In the opinion of the Court, the Agadir case is perfectly applicable to the argument maintained by the high party complainant. It matters not that in that case the parties who claimed that their rights were "menaced" were great military Powers. The proposition was there adopted as a fundamental principle of public law that all states are naturally equal and that they are under the same obligations and enjoy the same rights. "The relative magnitude," says Sir William Scott, referring to sovereign states, "creates no distinction of right, and any difference that may be claimed in respect to that basis must be considered as a usurpation." (Calvo, *Derecho Internacional*, p. 197.)

Similar doctrines have been put forth on various occasions by North American publicists in discussing the absolute respect due to nations however feeble and diminutive they may be.

The illustrious former Secretary of State, Mr. Root, at the Pan-American Congress held at Rio de Janeiro, said:

> We deem the independence and *equal rights* of the smallest and weakest members of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong.

Those declarations were confirmed by their author, in 1916, at the Pan-American Scientific Congress.

At the memorable Conference at the Hague in 1907, the principle of the legal equality of all states was adopted in obligatory form:

> Another glorious achievement that can never be denied to the world reunion of 1907, lies in the fact that it made secure against all attack the great principle of the legal equality of all nations. A certain chapter of the proceedings of that great conference shows clearly a more or less deliberate attempt to impose, by the rules of law, on the weak the sovereignty of the strong, by creating original means of intervention under the disguise of an independent jurisdiction.
>
> The clamor against those proposals was great and the opposition positive and successful. Rather than permit so radical a change in the society of nations and undo, in 1907, the work consecrated by four centuries of world struggle, the majority of the nations, great as well as small, would have broken up the Conference and brought about a turbulent dissolution. (*La Segunda Conferencia de la Paz*, by Don Antonio Bustamante y Sirvén.)

Consequently the considerations put forth on this point by counsel for the Government of Nicaragua are ineffectual when he points out that in the Agadir case great military Powers were involved, among which the danger of collision and effective war is a constant menace, whereas in the case of the naval base in the Gulf of Fonseca, small adjacent countries only are involved, as to which neither clashes nor rivalries with the United States are to be thought of.

The history of Central America shows that *the principle of nationalities* has always been defended by the public power; and these were not animated by a feeling of rivalry or fear, but by obedience to the sociological law that governs the harmonious development of ethnical unities and brings about their cohesion.

Public documents [1] demonstrate that in the year 1854, in view of the

[1] Contained in a study entitled: *La Venta* (sale) *de la Isla del Tigre en 1854*, by Dr. David Rosales, Jr., in which the author places the official documents that relate to these facts at the disposition of the Government of El Salvador.

fear that the Honduran Government would alienate Tigre Island, in the Gulf of Fonseca, and turn it over to a foreign government, Guatemala, Costa Rica and El Salvador lodged a formal protest with the Honduran Department of Foreign Relations. "The matter in question compromises, not only the nationality and independence of Honduras, but that of all Central America," said the Guatemalan Minister Señor Aycinena, in his note.

The Costa Rican Minister, Señor Calvo, after certain pertinent reflections, stated that:

> The fact denounced by the official press of El Salvador and communicated to this Department by the Foreign Office at Cojutepeque that Tigre Island had been conveyed to Mr. Follin, who held himself forth as the American Agent, and the equally manifest intention of selling other parts of Central American territory, bears the character of *antinationalism* that affects the security of this part of the continent and forces the neighboring states to intervene in opposition to contracts that compromise their own future integrity as well as that of the contracting state.
>
> As a government, that of Honduras is as independent as any other and may exercise its sovereignty and modify it as it pleases; but, as a member of the society of Central America, title to which it has so often descanted upon in these later times, it has no right to exercise its sovereignty at the cost of the whole, of which it is no more than a small part.

His Excellency Minister Gómez, in his turn, said:

> The Government of El Salvador believes that the transfer of our coasts or islands into foreign hands imports imminent or remote loss of the independence of those countries, etc.

The documents referred to also show that to those protests the Government of Honduras replied by declaring that the fears suggested were unfounded; but that, for the purpose of avoiding the anticipated danger, it had, on a date prior to the protests, issued a declaration making clear its purpose, as follows: "That the State was not alienating, and could not alienate, the rights of ownership and sovereignty that it possessed over the said island."

This attitude of the Governments of Central America in support of the principle of nationalities is not unique on the American continents. It was also asserted by the Government of the Republic of Chile when it feared that the Government of Ecuador would convey the Galápagos Islands to the United States.

The diplomatic steps taken in that matter, in the year 1869, gave rise to the protocol parleys that culminated in the express declaration of the Government of Ecuador that such alienation was not intended;

and, alluding to that important incident of South American diplomacy, Don Aurelio Bascuñán Montes said, in his valuable *Miscelánea histórico-diplomática* presented to the Fourth Scientific Congress (First Pan-American):

> The Minister of Foreign Relations, Señor Amunátegui, reiterated his accord with the facts set forth, that constituted a guarantee of the correct and loyal procedure of a government bound to Chile by so many ties, and that he felt that he might be excused from giving further reasons, since, according to the declarations of the Ecuadorian Minister Plenipotentiary, there was no ground for belief that the Government of that sister Republic had any idea of entering into such a transaction.
>
> Such is the extract from the Flores-Amunátegui protocol conference of December 31, 1869.
>
> This was not the first time that the Galápagos matter had occupied the attention of the Pacific Republics.
>
> Minister Flores, in the course of his protocolized and detailed declaration of 1869, alludes to the mission of the Chilean Minister, Don José Francisco Gana to Quito, in the year 1855, to settle that same question, a mission that was of the greatest importance, judging from the following paragraph, which President Don Manuel Montt used in his inaugural address before the legislative body in 1856:
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> "The extraordinary mission sent to Ecuador in the beginning of last year has returned home after faithfully carrying out the views of the Government. The convention of November 20, 1854, referring to the Galápagos Islands, has remained without effect. The Ecuadorian Government, with dignity and caution has dissipated the anxieties caused among the Republics of the continent by certain stipulations of that convention."

The antecedents invoked show that the proclamation of the Monroe Doctrine in the year 1823 did not prevent the American countries from exercising the unavoidable duty of looking after the integrity and defense of their territories, for that celebrated declaration, unquestionably of the highest interest, consecrates the express recognition of "the free and independent condition which they (the American continents) have assumed and maintain"; but it does not involve an international tutelage that confides the defense of the continent against all attempts at colonization — in a unique and exclusive form — to the military and naval power of the United States, to the exclusion of and ignoring the duties that pertain to the other Latin-American Republics. That proposition does not comport with the solemn declarations of the statesmen of the United States, repeated on many memorable occasions, and much less could it constitute an obligatory tie for the Republic of El Salvador, which is not bound in contractual form to recognize even an authentic interpretation of the doctrine of President Monroe.

Whether the concession and operation of a naval base may be, as maintained by counsel for the high party defendant, for the greater welfare, security and guaranty of the Isthmian countries, or whether it signifies, as alleged by the high party complainant, a cause for vexation and worry, and a source of danger to its autonomy, is a question of purely political portent that conflicts with the tendencies or plans of the Government of the United States, an international entity not subject to the jurisdiction of this Court. It is enough for its juridico-arbitral finality to consider, in its true weight, the moral obligation also imposed by treaties and express laws to maintain the integrity of Nicaraguan territory and to preserve its republican system free from all foreign sovereignty — however noble and disinterested it may be — in order to estimate the menace to the security of El Salvador resulting from the establishment of a naval base in the Gulf of Fonseca provided for, not in anticipation of a state of peace, but in anticipation of a state of war which, should it come, would convert the maritime and land territory of that Republic into a field of military operations subject to all the attendant risks and havoc, besides rendering nugatory El Salvador's duties of neutrality to the whole extent specified in the Hague Convention.

In support of the Court's conclusion that the establishment of a naval base at any point on that interior and closed sea would menace the natural security of El Salvador, a great many historic precedents could be invoked, and a needlessly prolix collation made of the uniform doctrines laid down by the publicists; but the Court does not think that this is necessary in a matter so clear in the light of the principles of science. It confines itself, therefore, in concluding this section, to quoting two principal conclusions reached by the Institute of International Law at its first session in Washington on the 6th of January, 1916, on the occasion of the solemn Declaration of the Rights and Duties of Nations, as follows:

I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right, nor justifies the act, of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.

V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative and the right of one is the duty of all to observe. [1]

[1] Translation corrected to conform to official English text of Declaration published in this JOURNAL for January, 1916 (Vol. 10), pp. 125 and 126. — ED.

Chapter IV

CONCERNING THE PRIMORDIAL INTERESTS OF EL SALVADOR AS A CENTRAL AMERICAN STATE

Whereas: It is also unquestionable that the Bryan-Chamorro Treaty violates primordial interests of the Republic of El Salvador as a Central American State and that that moral violation results from the fact that the Government of Nicaragua ceded to the United States an integral part of Nicaragua's territory when it conveyed a naval base in the Gulf of Fonseca and leased Great Corn Island and Little Corn Island in the Atlantic, turning those territories over to the complete domination of the sovereignty of the concessionary nation.

By virtue of the beautiful traditions of history the peoples of the Central American Isthmus make a *moral whole,* and, although, at present divided into five independent States, they have not broken the strong ties that call upon them, now as well as formerly, to form a single nationality.

Nicaragua and El Salvador cannot consider themselves as two international entities bound by mere ties of courtesy. No; the two countries together formed part of the Captaincy-General of Guatemala subject to the dominion of the Spanish monarchy; later they burst forth into a life of freedom by the same solemn declaration of independence, and remained constituent parts of the Federal Republic of the Center of America until the year 1839. Since that date the two countries have taken part in various attempts at union that culminated, in the year 1898, in the appearance of the Greater Republic of Central America.

Their political constitutions have always declared that the two countries are disintegrated parts of the Central American Republic and that they recognize the necessity of a return to the union. These repeated declarations cannot be interpreted as void of meaning, for they are a part of the fundamental codes, the most important organic acts of two peoples, laying down the basic principles for the regulation of their lives and their tendencies.

On the other hand, it is not true that the Republic of Nicaragua, in its present constitution, adopted in 1912, failed to declare — and merely as a simple aspiration — the longing of the Nicaraguan people

to see reborn the Republic of Central America. Article II of that political constitution reads as follows:

> Sovereignty is one [at once] inalienable and imprescriptible and resides essentially in the people, from whom the functionaries appointed by the Constitution and laws derive their powers. Consequently, no pacts or treaties may be entered into that are in opposition to the independence and integrity of the nation or that in any way affect its sovereignty, save those that tend toward the union of one or more of the Republics of Central America.

The Court is of opinion that the above proviso constitutes the expression of the national sentiment of Nicaragua in regard to the reconstruction of the old Central American State, because for that purpose only does its sovereign will consent to acts that affect the sovereignty or integrity of the nation.

It should, therefore, be understood that every dismemberment of territory, even though in the form of a lease, violates primordial interests of El Salvador as a Central American people, above all in respect of those places in which both States have interests in common and in solidarity.

CHAPTER V

VIOLATION OF ARTICLE II AND IX OF THE GENERAL TREATY OF PEACE AND AMITY

Whereas: The Court is of opinion that Article II of the Bryan-Chamorro Treaty is violative of Articles II and IX of the Treaty of Peace and Amity entered into by the Republics of Central America. The text of Article II of the last-named treaty reads as follows:

> Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that *every disposition or measure that may tend to alter the constitutional organization in any of them is to be deemed a* MENACE *to the peace of said Republics.*"

The high parties litigant do not agree respecting the interpretation and scope of that international pact. The high party complainant maintains that by the text of that provision the five States agree not to alter in any form their constitutional order, because such alteration would be considered by all and each of them as a menace to their security and derogatory to that prestige that should surround the institu-

tion under which we are governed. The high party defendant, on the contrary, gives it as its opinion that the provision has no other legal purpose than to inhibit such action on the part of a Central American State as would redound to the prejudice of the constitutional order in any of the others. The measures thus prohibited are not those dictated by a country for the conduct of its proper life; they are such as might be adopted by another State for the alteration of the constitutional order.

Pervading the letter and spirit of Article II, now under examination, is a thought of capital importance: the agreement to maintain peace in Central America, and, as a means for the realization of that main purpose, the observance of the institutions and the obligation to preserve unalterably the constitutional order. All agencies, measures, elements or circumstances that alter that constitutional order, whether arising from without or within that State whose constitutional order might thereby be disturbed, must, therefore, be logically, considered as prohibited. And in that sense it would be purposeless to discuss what is understood by constitutional order: whether it be the maintenance of the democratic representative system of government in its well-known division of power, or the harmonious functioning of those organisms; or whether that order, in the language of the treaty, comprises also the phenomena of the relation between the signatory States, since it is unquestionable that under the principles of public law there is an alteration of constitutional order — in perhaps its most serious and transcendental form — when a state supplants, in all or part of the national territory, its own sovereignty by that of a foreign country and thereby, from that moment, overthrows its own laws in order that those of the concessionary State may govern therein.

In the sphere of principles the exercise of the public *auctoritas*, of *imperium* or of *jurisdictio*, on the part of the foreign sovereignty fundamentally alters the normal life of the nation, because national territory and its exclusive possession are indispensable elements of sovereignty.

The Government of Nicaragua, in infringing a constitutional standard — such as that which requires the maintenance of territorial integrity — has consummated an act that menaces the Republic of El Salvador, which is interested and obligated by the Treaties of Washington to maintain the prestige of the public institutions of Central America.

The application of those principles to the present discussion shows clearly that the five Central American States, by operation of the system of law created in virtue of the treaties concluded at Washington in 1907, solemnly agreed to save harmless their sovereign power and their autonomous systems, within the rule of strict legal relation which they are in duty bound to adhere to among themselves — this for the evident purpose of preserving those inalienable privileges for the work of political unity to which they aspire and which is so insistently safeguarded in those memorable pacts.

Article II of the Bryan-Chamorro Treaty also infringes Article IX of the General Treaty of Peace and Amity in force among the Republics of Central America because it provides that "the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States."

The United States could, therefore, concede to the vessels of Nicaragua, in the waters that remained under her sovereignty, all the exemptions, immunities and privileges that they might please to bestow upon such vessels; but Nicaragua could not ask that similar concessions be extended to the vessels of the other Central American countries. The United States have the power to disrupt the equality of treatment accorded to all the vessels of the signatory countries by Article IX of the Treaty of Peace and Amity; and Nicaragua, by the voluntary act of her Government, has incapacitated herself from complying with what was agreed to. It is true that nothing prevents that Republic from bestowing any rights or imposing any charges upon its own vessels and the vessels of the other signatory countries; but this on a footing of perfect equality, and in such solemn manner that no difference whatsoever could be made between a Nicaraguan vessel and any other Central American vessel. Nicaragua, in transferring her adjacent seas to the ownership and sovereignty of a foreign nation, not only as to her coastal mainland on the Gulf of Fonseca, but as to the so-called Corn Islands in the Atlantic, has surrendered all power to enact laws and regulations for her own vessels, and, therefore, to control, with equality in laws and regulations, the vessels of the other Central American States.

The Court has no hesitation in affirming that the Bryan-Chamorro Treaty, which contains no limitation or reserve in that respect, but which rather avoids expressing the fact that in the leased territory

and waters the laws and sovereign authority of the United States alone will govern, places in jeopardy what the Republic of El Salvador acquired in Article IX of the General Treaty of Peace and Amity, since it leaves them dependent upon a foreign sovereignty that is under no obligation to recognize or respect them.

CHAPTER VI

CONCERNING THE INTERVENTION AND CONSENT OF EL SALVADOR AND THE OBLIGATION OF THE NICARAGUAN GOVERNMENT TO REËSTABLISH AND MAINTAIN THE STATUS QUO ANTE

Whereas: The Government of Nicaragua, being bound by solemn agreements to the Government of El Salvador to maintain unchanged the constitutional order and the full exercise of the perfect rights that have been mutually recognized in the General Treaty of Peace and Amity, the ceding Government could not, without the authorization and consent of El Salvador grant a naval base in the Gulf of Fonseca, impressed as it is with common ownership pertaining to three co-sovereigns, since none of them could properly dispose of its rights independently without affecting those of the other sovereigns, in view of the status of community in which the Gulf has been and is held, thanks to the universal principle handed down by Roman law and faithfully observed in modern law, that coparceners may not perform any act disposing of a thing possessed in common except jointly or with the consent of all.

The absence of that *joint will* is equivalent to the omission of an *empowering formality*, since the Government of Nicaragua lacks the legal capacity to alter by itself the *status jure* existing in the Gulf of Fonseca; and hence is born the right of the high party complainant to hold that the Bryan-Chamorro Treaty violates its rights.

Whereas: As a logical consequence of the violation of rights claimed by the Government of El Salvador and recognized by this tribunal, the Government of Nicaragua is impressed with the obligation to take all possible means sanctioned by international law to reëstablish and maintain the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty.

It is clear that under the principles of international law and the previous stipulations agreed to in the Treaties of Washington, the high party defendant was without power to enter into a new treaty

that undermined in any degree the moral and legal structure of those principles and stipulations. (See the doctrines laid down by Fiore, Olivart and Pradier-Fodéré.) Hence the obligation imposed on the Government of Nicaragua to reëstablish and maintain, by all means possible, the legal status respecting the matters here in controversy that existed with El Salvador prior to the 5th of August, 1914, on which date that memorable treaty was concluded.

Chapter VII

Concerning Prayers III and IV of the Original Complaint

Whereas: The Court is without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be enjoined "to abstain from fulfilling the said Bryan-Chamorro Treaty." On this point the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of *abstention*, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court. The Court, therefore, in this regard, adheres to the doctrine laid down in the former decision — of September 3, 1916, in the case of Costa Rica *v.* Nicaragua (Reports of the Central American Court of Justice, Vol. V, Nos. 14 to 16).[1]

Nor does the Court grant herein any other form of relief, as prayed by the high party complainant in the fourth prayer of its original complaint, because such relief has not been prayed for in concrete form, and was not made the subject of argument in the case during the trial.

Wherefore:

The Central American Court of Justice, in the name of the Republics of Central America, and in the exercise of the jurisdiction conferred upon it by the Convention of 1907, concluded at Washington, to which it owes its existence; also in conformity with the provisions of Articles

[1] Printed in this Journal for January, 1917 (Vol. 11), p. 181.

I, XIII, XXI, XXII, XXIV and XXV of said Convention, and with the provisions of Articles 6, 38, 43, 56, 76 and 81 of the Ordinance of Procedure of this Court; and, furthermore, in accordance with the conclusions voted at the session of the 2d instance, hereby, and by a majority vote — which is made necessary because of the dissent of the judge for Nicaragua, whose vote was, therefore, recorded separately — renders the following —

DECISION:

First. That the Court is competent to take cognizance of, and decide the present action brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua;

Second. That the exceptions interposed by the high party defendant be, and they are hereby, denied;

Third. That, by the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, *menaces the national security* of El Salvador and *violates* her rights of coöwnership in the said Gulf, in the manner and within the limitations, set forth in the Act Recording the Vote of the Court and in Chapter II of the Second Part of this Opinion;

Fourth. That the said treaty *violates* Articles II and IX of the Treaty of Peace and Amity, concluded by the Central American States at Washington on the twentieth of December, nineteen hundred and seven;

Fifth. That the Government of Nicaragua *is under the obligation* — availing itself of all possible means provided by international law — to reëstablish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant Republics in so far as relates to the matters considered in this section;

Sixth. That the Court refrains from rendering any decision in response to the third prayer of the original complaint; and

Seventh. That, respecting the fourth prayer of the original complaint, the Court also refrains from rendering decision.

Let the foregoing be communicated to the high parties litigant and to the other Governments of Central America.

ANGEL M. BOCANEGRA.
DANIEL GUTIÉRREZ N. (NAVAS).
M. CASTRO R. (RAMÍREZ).
NICOLÁS OREAMUNO.
SATURNINO MEDAL.
MANUEL ECHEVERRÍA, *Secretary.*

Contrebande de Guerre Blocus Droit de Visite. By Yves Favraud. Paris: Georges Monge. 1916. pp. 390.

This is a volume of 390 pages of a somewhat unusual construction. There is no preface and, at the beginning, no *Table de Matières.* There is such a table at the end of the volume, but a very brief one covering but three pages. There is no index whatever, and without a full index a work of learning and reference is difficult of use. Its contents, however valuable, are almost inaccessible.

One page is given to *errata* on which 36 errors are noted and corrected. The brief introduction of three and a half pages announces that the author will here expose impartially the methods followed by each belligerent without complaint against the Germans or pleading in favor of the Allies. However, without violence or abuse to the Central Powers, the cause of the Entente is, as is natural, habitually supported.

The first part, covering eighty-six pages, is historical in character, giving a chapter each to contraband of war, right of visit and blockade, and the state of the question. This is brilliantly and positively written, like an informing lecture, with few references or citations. It gives, on the whole, an interesting, brief and systematic account of the origin, progress and present state of the international rules governing the topics treated.

The second part of the work deals with the application of principles in the war, 1914–1916, to contraband of war and blockade. This part is arranged under two titles. The first of these deals with the extension of the notion of contraband, the "lists of contraband," then "the results of the elaboration of these lists"; and, lastly, under the caption *Les Neutres et le Commerce* the author especially discusses American protests against the measures of the Allies as to prizes. A chapter of twenty-nine pages discusses the history and principles of blockade, and the novel practices of declaration of zones of war and blockade by submarines.

The third and last part of the text deals with the sanction of contraband and of blockade, and the right of visit and seizure. The first chapter of this part treats of the exercise of this right by the Allies. The second of submarine war and of the American notes and the academic contest, the third of the jurisprudence of prize courts. Eight and a half pages are devoted to Conclusions. Seventy-three pages are given to documents, being selections from the ratifications and reservations of the Second Hague Conference, the German *Ordonnance des Prises* of 1909, from *Reichsgesetzblatt*, Berlin, 1914, the Italian instructions as to prizes, and then follows a bibliography of eight pages.

In his conclusion, Doctor Favraud denounces the German doctrine that military necessity makes law as an insult to the law and as absolutely and desperately barbarous. He says the time for small reforms is past. It is necessary to choose between the old statute, the creator of the actual facts, and a new statute totally different, which will place the nations beyond the possibility of seeing themselves renew for a long time the sorrows of the modern war. He closes his conclusion with this characteristic passage:

Il faut, pour que la Patrie soit plus rayonnante et plus heureuse, pour que la paix soit plus profonde et durable, que les relations mondiales soient basées désormais, non plus sur le Droit de la Force mais sur la Force du Droit.

CHARLES NOBLE GREGORY.

L'Italie et la Guerre actuelle. Association nationale des Professeurs d'Université d'Italie, Florence. 1916. pp. viii, 285.

This is a work prepared for the benefit of the Red Cross by the National Association of University Professors of Italy, to put in evidence the "just and noble reasons" for Italian entrance into the war. The French edition enlarged from the Italian has two new chapters.

The opening chapter is upon "The moral reasons of our war." Professor Del Vecchio here endeavors to show that although Italy was wholly justified in entering the war on grounds of legality and national policy, there is also a moral justification. Emphasizing the embodiment of national entities in political unities, he follows Romagnosi. He favors the "ethnicarquie," by which Romagnosi means a state including all persons of a common *nationality* and within *natural* boundaries. The Italian aim, he justifies on philosophical grounds, quoting authorities. In fighting to attain this end for herself Italy really has

a wider end in view, that is the principle of national autonomy, as opposed to the German principle of lust for dominion based on a distorted philosophy. There is an attempt to prove that justice and not force is the aim of Italy. "It is precisely these principles and these ethical values — the autonomy of individuals and of nations, the primacy of right over force, the fidelity to sworn faith — which alone can render life worth while for men in general." (p. 19.)

In like eloquent terms Professor Fedozzi, of the International Law Department at Genoa, describes "The national ideal and the duty of Italy." He recognizes accomplishment of the national ideal as the primary Italian aim, and expounds the Italian doctrine, affirming nationality as a principle of international law. According to this school the *nation* not the *state* is the true unit which enjoys rights, and is under obligations at international law. "According to the Italian school, of which the initiator is Mancini, nationality is a resultant of natural and historical elements." (p. 30). Professor Fedozzi traces the history of this theory in Italy and shows that the principle of nationality is not entirely theoretical in Italy, for since the Piedmontese law of March 17, 1848, in other provinces as well, inhabitants of the unredeemed provinces have been accorded political privileges, now almost equal to those of Italians proper. (p. 37).

Professor Bonfante's chapter on "The political reasons for our war" outlines the course of recent Italian policies. Although in the main practical, Professor Bonfante also launches into the realms of political idealism in closing with the prophecy that as the city state merged into the national state, so the national state will in time merge into the world state, and Italian policy has really made for the consummation of this high ideal.

In his article on "The denunciation of the triple alliance" Professor Fedozzi becomes more technical and from relevant sections of the Triple Alliance Treaty, as first published in the German White Book, argues that the agreement was intended to apply only to a defensive war, and that the war of Austria, following her own aggressive action, not only fell short of the *casus fœderis* mentioned in Article 3, but also of the situation in which Italy would have been obliged to maintain "benevolent neutrality" as provided in Article 4. Furthermore, he contends that Austrian action was a violation of the treaty and gave ample justification for the Italian denunciation and reassumption of complete freedom of action.

Professors Arias and Errera deal respectively with the economic and geographic aspects of Italian nationality. They show that Italy is both a natural unity and an economic unity. The Italian school does not limit nationality to the narrow sense of the character of the people, but considers natural boundaries and economic areas as implied in the term.

An historical chapter by Professor Leicht deals with the struggle since the middle ages between Italy and Austria over the "unredeemed territory." The actual conditions in this region with reference to the present character of the people is described by Professor Bianchi. The effect of suppression of the Italian language, the frequency of pro-Italian demonstrations in the Trentino, the Austrian repressive measures, even amounting to censorship of mails going into Italy, are pictured.

Professors Solmi and Revelli also treat historical and political relations of Italy in the Mediterranean and the Near East. They regard as inevitable the Italian conflicts with Turkey in 1911 and again in 1915. The recent increasing subserviency of Turkey to Pan-Germanism was regarded as a menace to Italian commercial interests in the Eastern Mediterranean, a region whose shores have been extensively colonized by Italians.

The closing chapter by Professor Albini attempts to interpret Italian character and Italy's place in world civilization, contrasting Italian and Germanic art and ideals, dreading the regimentation which Germany might impose on the world, and which military efficiency makes necessary. Yet he hopes there is a brighter side, and that the war may lead to a new idealism and artistic regeneration, especially in Italy.

While, as might be expected, the book has the usual faults of special pleading, it undoubtedly gives a good clue to the point of view of educated Italians, and is an excellent summary of different phases of modern Italian political thought, and its Italian idealism and tendency to subordinate the practical to the philosophical is a hopeful and striking contrast to many recent volumes.

GEORGE GRAFTON WILSON.

Des Requisitions en Matière de Droit International Public. By Georges Ferrand. 2d ed., Paris: A. Pedone. 1917. pp. xx, 490.

This is a revised and enlarged edition of a doctor's thesis originally published in 1892. It contains prefaces by Professor Renault and the

Intendant General Thoumazou, a bibliography of the literature relating to requisitions and contributions, and a number of "annexes" containing the texts of various official and other documents. Professor Renault, in his preface, after adverting to German practice in respect to the levying of contributions and requisitions contrary to the international conventions and established usages, expresses the hope that the time will come when belligerents will respect the rules of international law in a manner to reconcile military exigencies with consideration of justice.

M. Ferrand's treatise is probably the most elaborate study of the subject of contributions and requisitions that has been made. It is almost encyclopædic in its scope and character, containing as it does a vast amount of information in regard to the practice in the past, the views enunciated at the Brussels and Hague Conferences and the conclusions reached, the discussions in the Institute of International Law, the rules laid down in the military manuals of the more important states, and the opinions of the jurists, text writers, and military authorities.

His analyses of the *proces verbaux* of the commissions of the Hague Conferences which considered the subject are especially full and detailed. He considers, in turn, the general principles governing the law and practice, the various kinds of requisitions, the objects that may be requisitioned, the purposes for which supplies may be taken and contributions levied, the procedure to be followed, the duty to furnish receipts, the question of payment, the duty of the state to indemnify its nationals for supplies taken without payment, the rights of neutral persons and property, sanctions for failure to comply with the demands of the requisitioning belligerent, etc. He readily admits that the right of a belligerent to requisition supplies and to levy pecuniary contributions is unanimously recognized, although the exercise of the right is subject to certain well-established limitations which he examines in turn. Concerning the requisition of personal services which the Germans have resorted to on so large a scale during the present war, M. Ferrand very properly contends that they have exceeded their lawful rights in compelling the enemy to dig trenches, work in munition and barbed wire factories, stone quarries, to construct roads for strategic purposes, and to operate railway trains for the transportation of troops and military supplies.

Regarding the much controverted question of the right to requisi-

tion guides from the enemy population, M. Ferrand concludes, from a detailed study of the views expressed at the Hague Conferences and from an examination of the text of the convention, that it was the intention of the convention to forbid requisitions of this kind. This view is reënforced by the interpretation of the great majority of text writers and the conclusions of the Institute of International Law, to say nothing of the considerations of justice and public policy. He recognizes the right of a belligerent to take possession of the railways and use them for military or other purposes in accordance with the well-established rules of usufruct; but he, very properly it would seem, denies the right of a belligerent to tear up the tracks and transport the rails, cross ties, and rolling stock to his own country, as the Germans recently did in the case of certain Belgian railways which were torn up and carried away for the construction of new lines in Poland. This is not permissible, among other reasons, because the duty imposed by international law on the occupying belligerent to restore the railway, at the conclusion of peace, is practically impossible of fulfillment. He reaches the same conclusion regarding the German practice of requisitioning Belgian horses and transporting them to Germany, not for the "needs of the army" but for the use of German farmers and stock raisers in their own country; and for the same reason he condemns the German practice of seizing and removing to Germany the machinery and equipment of Belgian factories and manufacturing establishments for use by their own manufacturers at home. The theory laid down by Von Moltke in his letter to Bluntschli and by the *Kriegsbrauch im Landkriege* that a belligerent is not bound to take into consideration the resources of the country but may requisition everything that the army needs, M. Ferrand very justly attacks as not only harsh but contrary to the plain language of the Hague Convention.

While M. Ferrand's work does not purport to deal with requisitions at municipal law, he nevertheless devotes a chapter to the consideration of the right of the inhabitants to reimbursement by their own government for supplies taken by the enemy and for which no payment has been made, and he gives a resumé of French law and practice in respect to this matter, both during the War of 1870–71 and during the present war.

One chapter of the present work is devoted to a review of German policy in respect to the levying of contributions and requisitions (but not collective fines) during the present war, but in view of the large

scale on which the Germans have resorted to this method of raising money and supplies, and in view of the protests which it has provoked on the ground of illegality, it seems to the reviewer that the subject is inadequately treated. In reality the chapter consists mainly of quotations from the reports of the Belgian and French official commissions of inquiry and contains little information beyond what is found in those reports. The facts are, of course, difficult to obtain at present, but if they are ever available, as it is to be hoped they will be, they will afford materials for a valuable chapter in the history of international law which is yet to be written.

JAMES W. GARNER.

Belgium's Case; A Juridical Enquiry. By Ch. de Visscher. Translated from the French by E. F. Jourdain, with a preface by J. Van Den Heuvel, Minister of State, London, New York and Toronto: Hodder and Stoughton. 1916. pp. xxiv, 163.

On August 4, 1914, the German Chancellor announced to the Reichstag, to quote the author, that

> Our troops have occupied Luxembourg and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. . . . Necessity knows no law. We were compelled to override the just protest of the Luxembourg and Belgian Governments. This wrong — I speak frankly — we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened as we are, and is fighting for his highest good, can only have one thought — how he is to hack his way through.

This statement coming from such a source at such a time attained at once a significance that all the neutral world was quick to perceive. It rendered difficult the task of German apologists who sought to convince neutral opinion that the invasion of Belgium was not without justification. A number of such individuals assumed that task, however, and made vigorous, earnest, and elaborate effort to accomplish it. Their labor suggests the picture drawn by Carlyle, in his Essay on Burns, of a dwarf vainly struggling to hew down mountains with a pickax. Lest, however, some uninformed or prejudiced individual, however pure in heart, might be unbalanced by the torrent of pamphlets and articles from the pens of men of reputed learning, Professor Charles de Visscher, of the University of Ghent, has undertaken to put the case of Belgium in its true light.

He calls his work a Juridical Enquiry. He adverts to the basis of

Belgian neutrality and its characteristics, calling attention to the origin and character of the permanent neutrality of Belgium, and the force of international agreements purporting to protect the rights of neutral states. He deals carefully with the German plea of necessity and with the distinction drawn between the right of self-defense (*notwehr*) and the alleged right which a so-called state of necessity may induce (*notrecht*). He denies the existence of evidence in support of the allegation that the conduct of France excused the German occupation of Belgium on grounds of self-defense.

The most interesting portion of the book is the treatment of the German plea of necessity as expressed by the term *notrecht*, and formally relied upon in German diplomatic intercourse. This plea asserts that a state has a right for strategic reasons to invade the territory of a neutral and blameless state, if by so doing a decisive blow may be struck by the most easy and rapid way against the enemy. It is essentially opposed to law. In fact, as Professor Kohler of Berlin (as quoted by the author) has declared, "where the ordinary rules of juridical organization suggest no way of resolving the problem, *law must bow before fact* and side with the conquerer: *factum valet.*" In response, Professor de Visscher takes the stand that there is no place for *notrecht* in international law, apart from the special cases in which it is implied in, and co-extensive with, the exercise of self-defense; and his American readers will not be disposed to disagree with him.

No small service has been rendered by this author in marshaling the views of German writers, and in revealing their philosophy. It is important that intelligent opinion in the United States should be enlightened respecting the place which the principles of international obligations occupy in the minds of Teutonic authors of academic distinction.

The author treats at length of the treaties of 1831 and 1839 in relation to Belgian neutralization, and discusses skillfully the subject of their interpretation in the light of German argument. The application of the Fifth Hague Convention is touched upon. Vigorous denial is made of the charge that Belgium violated any obligations of its permanent neutralization, and the German contentions that it did so are examined and weighed.

The author concludes that Germany has been ill-served by those to whom she committed her cause, and that "the propaganda of her jurists, neither discreet nor dexterous in treatment, has alienated from

her the sympathy which the brutal policy of her government had not altogether destroyed." The soundness of this statement will not be doubted in the United States.

Mr. Jourdain, the translator, has so accomplished his task as to cause the American reader to forget that the original text was written in a foreign tongue.

An index and a bibliography are appended.

CHARLES CHENEY HYDE.

The Balkan League. By I. E. Gueshoff. Translated by Constantin C. Mincoff. London: John Murray. 1915.

This book, by the ex-Prime Minister of Bulgaria and one of the creators of the Balkan Alliance, is one of the best bits of inside information we have as yet at our disposal concerning Balkan affairs during the years 1912 and 1913. And yet it is in many ways a teasing and even a disappointing work. Valuable as is the information it gives, it leaves much more untouched. For this, perhaps, the character of the book is to some extent responsible. It is not, despite its title, really a history of the Balkan Alliance: it is primarily written to defend the policy of Bulgaria in general and that of the Gueshoff Ministry in particular. Thus it centralizes the action far too much at Sofia and gives far too little weight and sometimes insufficient credit to the motives of Bulgaria's allies during the period. Again, its controversial nature explains the omission of certain facts which might tell against the Bulgarian cause. Actual misstatements do not appear to occur. A cursory comparison of the Russian correspondence as given by M. Gueshoff and as given by "Balkanicus" in his statement of the Servian cause shows a substantial identity. And yet such omissions as that of the letter of M. Sazonof to the Russian Minister at Sofia of May 3/15, 1913, instructing the latter to advise Bulgaria to yield and defending the Servian demand for a revision of the treaty, leave a bad impression. Narrow and partisan though it may be, it is doubtful, however, if it will be possible to pick in it the flaws which the Carnegie Commission found in the account of "Balkanicus." So far as it goes, the account seems to represent the truth, so far as it was known to M. Gueshoff.

Roughly speaking, the book may be divided into two parts, the first part giving the course of events from the first negotiations for the Balkan Alliance up to the outbreak of the first Balkan War, the

second carrying the account to the outbreak of the war between the Balkan Allies. The first half is of the greatest value, presenting many new facts and giving documents either new or else known hitherto only in summaries. The second half is, relatively speaking, almost worthless. Few, if any, new facts are given, and the documents have all been previously published in one form or another. It is a matter for regret that M. Gueshoff did not reprint more of the facts given and documents cited in his Bulgarian book *Criminal Madness* for the benefit of English readers. But whether M. Gueshoff regretted the tone of hostility to the King of Bulgaria which marked this book, or because he felt the republication inadvisable for other reasons, he contents himself with summarizing this earlier work in a note and merely reprints from it his letter of resignation.

M. Gueshoff is a native of Eastern Roumelia, educated in English schools and a graduate of Robert College, who has had a long and honorable career as Bulgarian representative at various European courts. He is leader of the Nationalist party, a group with strong pro-Russian and mildly clerical leanings. Unfortunately for his future policy, he came into power in May, 1911, at the head of a coalition cabinet, the other wing being represented by the National Liberals under the leadership of Dr. Daneff, whose aims, as the sequel shows, were not in agreement with his own. The result was a duality in Bulgarian policy which had fatal results.

The limitations of M. Gueshoff's book appear at the very beginning of his account when he deals with the formation of the Balkan Alliance. He throws Bulgarian policy too much into the foreground and tends to leave the impression that the real focus of the alliance was at Sofia, whereas there seem to have been at least three foci: Belgrade, Sofia and Athens; for the Balkan Alliance was no new project. Without reverting to the scheme of Tricoupis, it would appear that in 1909 and 1910 Servia approached Bulgaria, while M. Venizelos seems to have done the same in 1910. Indeed, the first act of M. Gueshoff seems to have been to break off the *pourparlers* with Greece, and when they were renewed by M. Venizelos the Bulgarian Prime Minister returned no reply. He himself tells us that he spent his first months in office in an abortive attempt to reach a *modus vivendi* with Turkey. The will to the Balkan Alliance was present in Belgrade and and Athens, but Sofia held back.

The reasons for this seem to have been two in number. In the

first place both Greece and Servia advanced claims in Macedonia as a price of alliance which Bulgaria was unprepared to admit. The second reason seems to be found in the pacific, almost pro-Turkish policy pursued by Russia during this period under the influence of M. Tcharikoff. While Russia was pacific, the Russophile statesmen at Sofia perforce followed suit. But circumstances were making this policy more and more impossible. News of attempted Ottomanization of Macedonia, of real or alleged massacres, fanned public opinion in Sofia to such a blaze that some action was necessary. And so the Servian negotiations were taken up again.

The course of these negotiations are fully described and throw much light, not only on the motives of Bulgaria, but also on those of Russia. We get less information as to the motives of Servia. With them the motive seems to have been fear of the advance of the Albanian rebels into Old Servia, an advance which seemed to foreshadow the breakup of the Turkish Empire and the formation of a Greater Albania, possibly under the protection of Austria and Italy. Such a solution would have been ruinous to Servia and had to be coped with at all costs. But Servia did not intend to ally to Bulgaria without any gain to herself. M. Gueshoff saw that concessions were necessary, and he was prepared to make them. Whether the line of demarcation drawn up really represented the division between Servians and Bulgarians in Macedonia is a question on which opinions still differ; at least it may be said that it had good learned opinion behind it — that of M. Tsvivits, the geographer. But this division of Macedonia did not represent the real Bulgarian desire; they openly pressed for autonomy for all of Macedonia. The report of the Carnegie Commission seems to represent this as a concession to Servia, but even a cursory reading of M. Gueshoff's account would appear to dispel this idea. For it was imposed on the unwilling Servians by the threat — more or less veiled — to break off all negotiations, and it was never accepted at all by the Greeks. It was evidently the solution preferred at Sofia.

The reasons given by M. Gueshoff for this view are that such a solution would avoid any complications from "the touchiness of our neighbors." What is meant by this it is difficult to say, but probably Roumania is meant. She had a long-standing claim to further extensions in the Dobruja at the expense of Bulgaria, and any direct gains by the latter would give her the right to demand compensations. But there is a possibility that Bulgaria had an even more Machiavellian

reason. An autonomous Macedonia, the majority of whose inhabitants were Bulgarian in sympathy, would tend to gravitate toward Sofia, and might, in time, become a second Eastern Roumelia. Whether the Servians felt this fear it is hard to say, but it seems evident that they adopted the Bulgarian formula under pressure and with the intention of dropping it if possible.

Another phase of the negotiations with Servia which evidently caused no small trouble at Sofia was the relations between their prospective ally and Austria; for Servian policy was a double one, one glance directed at Macedonia the other toward Vienna. No alliance was possible which did not guarantee Belgrade against an Austrian attack, and this fact seems to have been recognized from the start at Sofia. But it was no easy task to win over Ferdinand to such a development of the new policy. The arguments of General Fitcheff and the remembrance of an Austro-Roumanian agreement directed against Bulgaria signed in 1900 brought him to agree. But it is doubtful if he or many others in Sofia had any more real intention of carrying out this portion of the treaty than Servia had of allowing autonomy in Macedonia to become a possibility. The test came in the question of an independent Albania as raised by Austria in November, 1912. M. Gueshoff declares that he told Belgrade he would do all possible to support them, and there seems no reason to believe he was not sincere. But, if the official *Pester Lloyd* is to be trusted, such were not the views of his agent, Dr. Daneff, who told Von Berchtold at this time that Bulgaria had no possible objection to an independent Albania and the exclusion of Servia from the sea. The explanation of this contradiction seems to have been that Daneff, now that the Greeks and Servians were in possession of the coveted Macedonia, felt that exclusive reliance of M. Gueshoff on Russia as a means to achieve the Bulgarian claims was dangerous, and that Austria would be a good second string to Bulgaria's bow and should, therefore, not be alienated. And in this he seems to have been supported by the King.

Most valuable is the account given by M. Gueshoff of the mission of Daneff to Russia in the spring of 1912 and of the state of Russian opinion at the time. It shows clearly that while the Czar and Sazonof rejoiced in the Balkan agreement, they were by no means in favor of a Balkan war against Turkey. Indeed they refused to negotiate a military convention with Bulgaria lest it should arouse a militaristic spirit in Sofia. The account seems to prove that all the statements, so com-

mon in German and Austrian newspapers later in 1912 and in 1913, that Russia brought about the Balkan war, are unfounded. It seems clear from M. Gueshoff's account that the causes of the war can be found, and found alone, in Turkish misgovernment in Macedonia, and that outside intrigues played little or no part.

The break-up of the Balkan Alliance is scantily treated in M. Gueshoff's book and it is, perhaps, unnecessary to fill up the gaps. His argument follows two lines: first, that Servia's demands for a revision of the treaty were unjustified, and second that Russia supported Bulgaria. The second argument he supports by the documents from the Russian Orange Book to which I have already referred. The situation seems to have been about as follows: when the first Balkan War broke out, Bulgaria had been forced by military exigencies to forego her real objective, Macedonia, and to throw her forces against the Turkish army in Thrace. The result was that Servia and Greece were left as *beati possidentes* in Macedonia. Servia, disappointed in Albania, demanded a revision of the treaty, which M. Gueshoff refused, because it is doubtful if he could have remained a day at the head of affairs in Sofia had he counseled further concessions. His hope lay in the fact that Russia would refuse the Servian demands for revision and would enforce the original treaty, although a large and growing faction at Sofia seems to have lost confidence in Russia, and to have been inclined to draw close to Austria-Hungary. Indeed, if Mr. Bourchier, the well-informed correspondent of the *Times* is correct, Russia promised to arbitrate in the Bulgarian sense if the attack on Tchataldja were given up; but as the spring went on Russia began to swing to the Servian side. Finally, in the instructions to the Russian minister at Sofia on May 3, 1913, Russia clearly showed that she had gone over to the Servian plan of revision. M. Gueshoff's policy lay in ruins, and his only possible escape was by resignation, which followed two weeks later. In his earlier book he attacked the King, who had dismissed him; in this account he seems to feel it unwise to do so more than by implication. Attack Russia, the real source of his troubles, he seems to have been unable to do at any time. He is a martyr to "Holy Russia."

One closes the book with the feeling that he has been witnessing a tragedy. An honest man, perhaps a bit weak, attempted the impossible and failed. At least he may claim to be guiltless of the real Bulgarian error: the attack of June 29, 1913. That was the work of the

hot-heads against whom he had fought. And the Austrian alliance, on which they relied, proved as much of a broken reed as that with Russia, in which M. Gueshoff had placed his trust. Poor Bulgaria was as unfortunate in her friends as in her enemies.

MASON W. TYLER.

El Estado y el Ejercito. A contribution to the study of a proposed law establishing compulsory military service in Cuba. By Juan Clemente Zamora y Lopez. Habana: Aurelio Miranda. 1917. pp. xii, 244.

In this thesis, presented for the degree of Doctor of Public Law in the University of Habana, the author has very logically and convincingly justified compulsory military service in a democracy like Cuba. He has treated his subject under the following heads: Chapter I, Historical resumé of the doctrines relating to the State, its origin and nature; Chapter II, Concepts of the Nation, the State and Government; its methods and ends; Chapter III, Concept of War, Pacifism; Chapter IV, Historical evolution of armies; Chapter V, Reasons of an external significance which warrant the establishment of compulsory military service in Cuba; Chapter VI, Reasons of an internal significance which warrant the establishment of compulsory military service in Cuba.

The chapter which naturally is of most interest to the student of international relations is that dealing with the "reasons of an external significance which warrant the establishment of compulsory military service in Cuba." The author does not attempt to conceal his apprehension that the United States is the greatest peril that menaces the independence of Cuba. He sees no danger in German ambitions in the Western Hemisphere. As for Great Britain, Doctor Zamora says that:

> as soon as England recovers her liberty of action, we will find in her, in case the North American menace compels us to ask it, the determined support of one who will view with pleasure as many opportunities as may present themselves to recover her lost influence over Cuba (p. 191).

Furthermore, Doctor Zamora continues to observe:

> Cuba has become in the eyes of the South American nations, with whom the United States is interested in maintaining cordial relations, the pledge of its good faith, and cannot, without a manifest violation of its most sacred vows and agreements, ac-

complish any aggression against us; the increasing influence of that South American alliance which we call the A B C will protect us without any doubt with as much or greater interest than England herself (p. 192).

The other main reason which would seem to the author to warrant compulsory military service in Cuba is stated by him as follows:

We have entered into an agreement with the United States to guarantee to them that Cuba shall not be a base of operations against them; we are the Belgium of America, and we shall render with our cannons and our soldiers the faithful fulfillment of an obligation, heavy without doubt, but noble and glorious, because it constitutes us, not as is falsely assumed, as wards or dependents of the great Republic of the North, but rather as its sincere friend and firm ally (p. 176).

It will be seen from these extracts that Doctor Zamora y Lopez has written in a striking and vigorous manner on a subject of great general interest. At a time when democracy is embattled and making immense sacrifices for the overthrow of Prussian militarism, it is welcome to have such a forceful defense of the principle of compulsory military service. The author has successfully proved that a free democracy can only maintain itself with safety when every citizen is trained to arms.

PHILIP MARSHALL BROWN.

Der Gedanke der Internationalen Organisation in seiner Entwicklung. By Jacob Ter Meulen. The Hague: Martinus Nijhoff. 1917. pp. xi, 362.

The author divides his book into three parts, the first part being The Development of the International Idea, the second, The Different Attempts of International Organizations, and the third, A Résumé. At the end of the book (pp. 365–384) there is an excellent bibliography.

A great number of books have appeared within the past decade dealing with the history of the growth of international organization due undoubtedly to the influence of the Hague Conferences. But none of them gives as sharp, succinct, and convincing an account of that growth as does the book here under consideration. In thirteen short chapters it covers the period from 1300 to 1800 and shows the changes which hurried a world, that had not a thought beyond the papal-imperial dualistic order of things, through the shocks of shattered ideals, religious and political, through the sudden rise of national aspirations and their occasional subordination to union against Turkish aspirations,

toward the strange idea that international federation might have as its aim perpetual peace rather than intermittent war.

The National State, as the author brings out clearly, was an *ils ne passeront pas* to Pope and Kaiser, and yet the new entities had to take shape and gain strength despite Pope and Kaiser, who remained both lively claimants, one to their spiritual, the other to their political domination. In the relations between Christendom and heathendom and in the propagation of the idea of 'the Just War' the Pope gained something at the expense of the Kaiser, but neither could keep pace with the doctrine of the balance of power, the idea of the *civitas maxima*, the successful federation, and the new economic theories which successively led up to an idea hitherto unknown of Peace.

The second part of the book gives excerpts from or comments upon twenty-nine different plans for international organization. The earlier projects are based either on the recovery of the Holy Land or the expulsion of the Turk from Europe, and they also have more or less clearly marked political purpose. Crucé is the first (1623) to propose an organization of more universal character including an international court, even proposing Turkey among the participants. After Crucé the projects take on somewhat more of an economic character, except that of Kant, which is almost so idealistic as to be classed among the Utopias. Sully's plan, usually called the Great Design of Henry IV, was the first to put forward the principle of the equality of the participating states (or rulers), while William Penn is the first to suggest that the representation of the different states depend upon annual income.

Theoretical peace plans might naturally be supposed to cluster about a war, and the dates of the various projects proposed show that to be true. How much the plans at any given time influence the next treaty that is made cannot be determined, but that in the long run the theoretical projects have furnished the basis for the practical trials seems well established. The author is to be congratulated for having given to the world so clear and sane an account of the ideas and the results of international organization.

R. V. D. MAGOFFIN.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For List of abbreviations, see p. 655.]

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KATHRYN SELLERS.